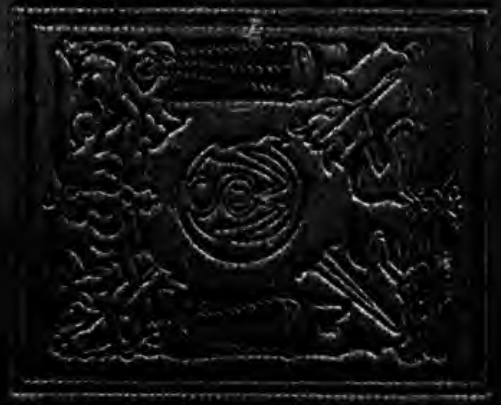

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EDITED BY

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ADVOCATE, AND OF THE MIDDLE TEMPLE BARRISTER-AT-LAW

VOLUME II

BANKRUPTCY TO *CHEQUES*

EDINBURGH

WILLIAM GREEN & SONS

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OF

THE LAW OF SCOTLAND

Bankruptcy.—The term "Bankruptcy," as used in the law of Scotland, has no fixed technical meaning. It may be used to denote *simple insolvency*, or the condition of inability to meet one's obligations. It is used in this sense in the well-known Bankruptcy Statute 1621, c. 18. This use of the term, however, is not now common. It is also used to denote *notour bankruptcy*, a state of insolvency which has attained publicity, as evidenced by definite statutory *indicia*, and which is attended with important statutory effects in restraining the debtor's power of dealing with his property, as well as his creditors' rights of securing preferences by diligence, while it further renders the debtor liable to divestiture of his estate for distribution among his creditors. This use of the term may be said to be the most technically correct, as it was the most common before sequestration and cessio, as a creditor's process, attained their modern frequency. The term Bankruptcy is now, however, commonly employed to denote the condition of a debtor's affairs under a public bankruptcy process of sequestration or cessio, whereby he is divested of his estate for distribution among his creditors in payment of their claims.

This vagueness of meaning is found not only in common parlance, but also in the use of the term by text writers (see Ersk. ii. 12. 59), and in public Statutes and judicial decisions. The recent tendency, however, is to the use of the term in the third sense above noted, which accords with its use in English law. It is expressly so defined in various Statutes, as, *e.g.*, the Bills of Exchange Act, 1882, and the Partnership Act, 1890. As occurring in deeds, the term is open to construction. Thus, in a contract of copartnery, a clause providing for dissolution upon the bankruptcy of a partner was held not to apply to the case of mere insolvency (*Munro*, 8 June 1813, F. C.). It may perhaps be said that the term will be construed as meaning divestiture under sequestration, or cessio, or private trust deed, where such meaning is not displaced by legitimate evidence of a different intention.

In the present article it is intended to deal only with NOTOUR BANKRUPTCY and its effects, the other aspects of the subject being treated under the heads of CESSIO, INSOLVENCY, SEQUESTRATION, and TRUST DEED FOR CREDITORS.

Notour bankruptcy in modern law was introduced by the Act 1696,

c. 5. (For a history of the Act, reference may be made to Bell, *Com.* ii. 196.) Prior to the passing of this Act, the tests and the legal consequences of public insolvency were not well defined, and the decisions on the cases which came before the Courts were more or less arbitrary in nature. The Act of 1696 prescribed certain definite tests of notour bankruptcy; it introduced the principle of giving a retrospective operation to notour bankruptcy when constituted; fixed the period of such constructive bankruptcy at sixty days; and prohibited, as frauds upon creditors, certain kinds of alienations to creditors by way of preference granted by a debtor after the commencement of that period. The provisions of the Act in question are as follows:—

"Our Soveraign Lord considering that notwithstanding of the Acts of Parliament already made against fraudfull alienations by bankrupts in prejudice of their creditors yet their frauds and abuses are still very frequent Does therefor and for the better restraining and obviating thereof in time comeing with advice and consent of the Estates of Parliament statute and declare That for hereafter if any debitor under diligence by horning and caption at the instance of his creditor be either imprisoned or retire to the Abbay or any other privileged place or flee or abscond for his personall security or defend his person by force and be afterwards found by sentence of the Lords of Session to be insolvent shall be holden and repute on these three joint grounds viz. diligence by horning and caption and insolvencie joyned with one or other of the said alternatives of imprisonment or retireing or fleeing or absconding or forcible defending to be a nottour bankrupt and that from the time of his forsaid imprisonment retireing fleeing absconding or forcible defending Which being found by sentence of the Lords of Session at the instance of any of his just creditors who are hereby empowered to raise and prosecute a declarator of bankrupt thereanent His Majestie with consent of the Estates of Parliament Declares all and whatsomever voluntar dispositions assignations or other deeds which shall be found to be made or granted directly or indirectly be the forsaid dyvor or bankrupt either at or after his becoming bankrupt or in the space of sixty dayes of befor in favors of any of his creditors either for their satisfaction or farther security in preference to other creditors to be voyd and null: Likeas it is declared that all dispositions heretable bonds or other heretable rights whereupon infeftment may follow granted by the forsaid bankrupts shall only be reckoned as to this case of bankrupt to be of the date of the sasine lawfully taken thereon but prejudice to the validity of the said heretable rights as to all other effects as formerly."

As the tests of notour bankruptcy prescribed by this Act were inapplicable to debtors exempt from personal diligence or out of Scotland, provision was made by the Sequestration Act of 1783 (23 Geo. III. c. 18, s. 1), for constituting it by means of diligence against an insolvent debtor's property; and in the subsequent Sequestration Acts of 1793 (33 Geo. III. c. 74, s. 3), of 1814 (54 Geo. III. c. 137,), and 1839 (2 & 3 Viet. c. 4,), these provisions were substantially repeated. By the existing Bankruptcy Act of 1856 (19 & 20 Viet. c. 79, s. 7), these different modes of constituting notour banktuptcy were, with certain modifications, re-enacted, and other modes were introduced. The provisions of the Bankruptcy Act, 1856, are as follows:—

"VII. *Notour Bankruptcy of Individuals.*—Notour bankruptcy shall be constituted by the following circumstances:—

"1*st*. By sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland; or

"2*nd*. By insolvency, concurring either—

"(*a*) With a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence, or, where imprisonment is incompetent or impossible, by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security: or

"(*b*) With sale of any effects belonging to the debtor under a poinding, or under a sequestration for rent, or with his retiring to the sanctuary for twenty-four hours, or with his making application for the benefit of *cessio bonorum*.

"VIII. *Of a Company*.—Notour bankruptcy of a company shall be constituted either in any of the foregoing ways, or by any of the partners being rendered notour bankrupt for a company debt."

Finally, the Debtors Act, 1880 (43 & 44 Vict. c. 34, s. 6), which abolished imprisonment for debt in the case of ordinary civil debtors, introduced a new and simple mode of constituting notour bankruptcy without the necessity of executing diligence against either the person or the property of the debtor. The provisions of the Act are as follows:—

"VI. *New Mode of Constituting Notour Bankruptcy*.—In any case in which, under the provisions of this Act, imprisonment is rendered incompetent, notour bankruptcy shall be constituted by insolvency concurring with a duly executed charge for payment followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by insolvency concurring with an extracted decree for payment followed by the lapse of the days intervening prior to execution without payment having been made.

"Nothing in this section contained shall affect the provisions of section seven of the Bankruptcy (Scotland) Act, 1856."

This mode of constituting notour bankruptcy has become all but universal in practice in the case of ordinary civil debtors.

The subject of the present article will be dealt with under the following heads:—I. The modes of constituting notour bankruptcy applicable to different classes of debtors. II. The commencement and endurance of notour bankruptcy. III. Its effect in equalising arrestments and poindings. IV. Challenge of preferences to creditors under the Act 1696, c. 5.

I.—Modes of Constituting Notour Bankruptcy applicable to Different Classes of Debtors.

(A) *Ordinary Civil Debtors*.—This class embraces all debtors who were rendered exempt from imprisonment by the Debtors Act, 1880 (43 & 44 Vict. c. 34), and also alimentary debtors to whom the exemption from imprisonment was extended by the Civil Imprisonment Act, 1882 (45 & 46 Vict. c. 42, ss. 3, 9). It does not include (1) debtors who were exempt from imprisonment under the law prior to the Debtors Act (*infra* (B)); or (2) debtors for "taxes, fines, or penalties due to Her Majesty, and rates or assessments lawfully imposed or to be imposed," who are still liable to imprisonment under the Debtors Act (*infra* (C)).

Ordinary civil debtors as thus defined may be constituted notour bankrupt either (1) by those modes prescribed by the Bankruptcy Act, 1856,

s. 7, as applicable to debtors then subject to imprisonment which do not involve personal diligence; (2) by the mode prescribed by the Debtors Act, 1880.

The modes competent under the Act of 1856 are as follows:—

(1) By sequestration, or by the issuing of an adjudication of bankruptcy in England or Ireland.

The issuing of a receiving order, which is a preliminary to an adjudication of bankruptcy, will not constitute notour bankruptcy (see ADJUDICATION OF BANKRUPTCY; Goudy on *Bankruptcy*, 72).

(2) By insolvency concurring . . . with sale of any effects belonging to the debtor under a poinding or under a sequestration for rent, or . . with his making application for the benefit of *cessio bonorum*.

In the case of a sale under a poinding or sequestration for rent, the sale fixes the date of notour bankruptcy.

Under the Debtors Act, 1880, notour bankruptcy is constituted in conformity with the provisions of section 6 of the Act quoted above.

This mode of constituting notour bankruptcy is exclusively applicable to the class of debtors now under consideration.

The insolvency of a debtor required by this enactment is not absolute insolvency (in the sense of an ultimate insufficiency of assets), but practical insolvency in the sense of "present inability to pay a debt. It is no answer to say that if he were given time to realise he might meet the obligation" (*M'Nab*, 1889, 16 R. 610, per L. Adam; *Teenan*, 1886, 13 R. 833; *Aitken*, 28 S. L. R. 115). When the other requisites of the Statute are present, there is *primâ facie* evidence of insolvency warranting application for sequestration or cessio (*M'Nab, supra*; *Fleming*, 1884, 21 S. L. R. 164, 9 App. Ca. 966; *Knowles*, 1865, 3 M. 457). This *primâ facie* evidence, however, may be rebutted by proof of solvency adduced in a petition for sequestration or cessio, or a petition for recall of sequestration, or in an action to set aside a fraudulent preference under the Act 1696, c. 5, or in proceedings to have diligence equalised (*Fleming, supra*; *Aitken, supra*; *Teenan, supra*; *Knowles, supra*; Bell, *Com.* ii. 159, 286; Goudy on *Bankruptcy*, 67).

The charge and the officer's execution must be unexceptionable in form and regularity (Bell, *Com.* ii. 160). The execution is the only competent evidence of the charge, and is probative (Dickson on *Evidence*, ii. ss. 1262 *et seq.*).

(B) *Debtors who were Exempt from Imprisonment prior to the Debtors Act*, 1880.—This class of debtors includes (1) pupils, who may be made notour bankrupt in respect of debts validly contracted on their behalf (Bell, *Com.* ii. 157; Goudy on *Bankruptcy*, 77); (2) idiots and lunatics (*ib.*); (3) Peers (Bell, *Com.* ii. 460); (4) members of Parliament during the sitting of the House of Commons, and for forty days prior and subsequent thereto (*ib.*); (5) debtors for sums under £8, 6s. 8d., not being for taxes or penalties due to the Crown, rates, or aliment (5 & 6 Will. IV. c. 70, ss. 1–5); (6) debtors under personal protection, as being in the sanctuary, or having obtained decree of *cessio bonorum*, or a warrant of protection or liberation under the 44th or 45th secs. of the Bankruptcy Act, 1856 (*Bald*, 1859, 21 D. 473; cf. *Union Bank*, 1880, 7 R. 655); (7) married women, except where the husband is abroad and the wife carries on business, or where she is living apart from her husband under decree of separation or protection order granted in terms of 24 & 25 Vict. c. 86, ss. 5 and 6 (see as to this class more fully, Goudy on *Bankruptcy*, 74); (8) persons abroad who are subject to the jurisdiction of the Scotch Courts in respect of domicile, or as being in right of heritable property in this country, or in respect of

residence in this country for forty days (*Pedie*, 1825, 1 W & S. 716; *Smith*, 1826, 5 S. 7; *Joel*, 1859, 21 D. 929; *Fraser*, 1870, 8 M. 400; Mackay, *Manual*, 53 *et seq.*). It is doubtful whether jurisdiction founded on arrestment is sufficient to enable notour bankruptcy to be constituted (*Croil*, 1863, 1 M. 509; see *Goetze*, 1874, 2 R. 150); (9) corporations and public companies (*vide infra* (D)); (10) debtors for sums declared by particular Statutes not to be enforceable by imprisonment.

In the case of these various classes of debtors, notour bankruptcy may be constituted (19 & 20 Vict. c. 79, s. 7) (1) by sequestration or by the issuing of an adjudication of bankruptcy in England or Ireland (see under (A) *supra*); (2) by insolvency concurring with sale of any effects belonging to the debtor under a poinding or under a sequestration for rent (see under (A) *supra*), or with his making application for the benefit of *cessio bonorum*; (3) by insolvency concurring with a duly executed charge for payment followed by (*a*) execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or (*b*) by execution of poinding of any of his moveables, or (*c*) decree of adjudication of any part of his heritable estate for payment or in security.

As to the nature of the insolvency contemplated, reference may be made to what has been said above ((A) *supra*). In the case of arrestment, it is thought that it must be an arrestment in execution for the same debt as the charge, and not an arrestment in security (see *Marshall*, 1834, 13 S. 179; Bell, *Com.* ii. 164; Kinnear on *Bankruptcy*, 12).

(C) *Debtors subject to Imprisonment.*—In the case of this class of debtors (see under (A) *supra*), notour bankruptcy may be constituted by: (1) Sequestration, or the issuing of an adjudication of bankruptcy in England or Ireland (see under (A) *supra*). (2) Insolvency (see under (A) *supra*) concurring with a duly executed charge for payment, followed by imprisonment or formal and regular apprehension of the debtor, or by his flight or absconding from diligence, or retreat to the sanctuary, or forcible defending of his person against diligence (19 & 20 Vict. c. 79, s. 7). The proper evidence of the imprisonment, etc., is the messenger's execution. It may, however, be negatived by parole (Bell, *Com.* ii. 162; *Spedding*, 1785, Mor. 1113; *M'Bean*, 1868, 7 M. 23; *Marshall*, 1834, 13 S. 179). In certain cases, parole proof of imprisonment, etc., is admissible (*Richmond*, 1789, Mor. 1113). (3) Insolvency concurring with sale of any effects belonging to the debtor under a poinding or sequestration for rent (see under (A) *supra*), or with his retiring to the sanctuary for twenty-four hours, or with his making application for the benefit of *cessio bonorum*.

(D) *Companies and Corporate Bodies.*—The word "company," as used in the Bankruptcy Act, 1856, includes "bodies corporate, collegiate, and ecclesiastic" (s. 4).

Private partnerships were held liable to notour bankruptcy under 1696, c. 5, the imprisonment of a partner being regarded as imprisonment of the firm (Bell, *Com.* ii. 158; *Duncan*, 1833, 11 S. 383). The Bankruptcy Act, 1856 (s. 8), enacts that "notour bankruptcy of a company shall be constituted in any of the foregoing ways [*i.e.* those prescribed by sec. 7 of the Act, see *supra*], or by any of the partners being rendered notour bankrupt for a company debt."

Private partnerships may now be rendered notour bankrupt either (1) in the mode prescribed by the Debtors Act, 1880 (see under (A) *supra*), through proceedings against a partner in respect of a company debt, or (2) in any of the other modes specified under (A) *supra*, or (3) where the debt is for taxes, etc., due to the Crown, or rates, in the modes specified under

(C) *supra*. A partnership is not made notour bankrupt by the sequestration of a partner's estates on his own application (see *Union Bank*, 1880, 7 R. 655).

As corporate bodies were never liable to imprisonment, the modes of constituting notour bankruptcy against them seem to be those specified under (B) *supra* (see *Wotherspoon*, 1863, 2 M. 348). Companies registered under the Companies Acts, although not liable to sequestration, may be rendered notour bankrupt (*Clark*, 1884, 12 R. 347).

Unincorporated associations, such as clubs, etc., which have no separate *persona*, cannot be made notour bankrupt, and recourse in such cases must be taken against individual members who are liable (Mackay, *Manual*, 158–60).

Railway companies, being exempt from ordinary diligence by Act of Parliament, do not seem capable of being rendered notour bankrupt (30 & 31 Vict. c. 126, s. 4: *Haldane*, 1881, 8 R. 669).

II.—Commencement and Endurance of Notour Bankruptcy.

The Bankruptcy Act, 1856 (s. 9), enacts that "notour bankruptcy shall be held to commence from the time when its several requisites concur." The application of this rule is sufficiently clear in several of the modes of constituting notour bankruptcy prescribed by the Bankruptcy Act, as well as in that prescribed by the Debtors Act, 1880. Where the notour bankruptcy is founded on personal diligence, it dates from the time that insolvency concurs with imprisonment or any of its equivalents following on an executed charge (see *Union Bank*, 1880, 7 R. 655). In the case of arrestment not loosed or discharged for fifteen days, the terms of sec. 7 of the Bankruptcy Act seem clearly to imply that the arrestment must follow the charge, so that the notour bankruptcy will commence on the expiry of the fifteen days (see Bell, *Com.* ii. 164 (note *b*); *Brown*, 1849, 11 D. 484). Sequestration takes effect from the date of the first deliverance; and in the case of an English or Irish adjudication of bankruptcy, the notour bankruptcy will date from the issue of the order of adjudication (see Adjudication of Bankruptcy).

Suspension of diligence after notour bankruptcy has been constituted, does not affect the date of the bankruptcy; but where suspension occurs at an earlier stage, notour bankruptcy will not commence until the diligence is completed (*Sutherland*, 1843, 5 D. 544; *Fleming*, 1884, 21 S. L. R. 165, 9 App. Ca. 966: *National Bank*, 1842, 5 D. 205; Bell, *Com.* ii. 166).

As to the commencement of the period of sixty days of constructive bankruptcy under the Act 1696, c. 5, reference may be made to what is said below (see *infra*, IV.).

With regard to the endurance of notour bankruptcy when once constituted, the Bankruptcy Act, 1856 (s. 9), enacts that it shall continue "in the case of a sequestration until the debtor shall obtain his discharge, and in other cases until insolvency cease, without prejudice to notour bankruptcy being anew constituted within such period." The proof of insolvency having ceased may be by evidence of payment of debts, or of the creditors having accepted of a composition, or of the debtor having obtained a discharge of his debts under a trust deed or cessio.

In order that notour bankruptcy may be made the ground of an application for sequestration by a creditor, it must have been constituted within four months prior to the presentation of the petition (Bankruptcy Act, 1856, s. 15). It may, however, for this purpose be constituted anew, although the debtor continues under the notour bankruptcy already con-

stituted (Bankruptcy Act, 1856, s. 9; *Wood*, 1891, 18 R. 382; *Blair*, 1889, 16 R. 947, 17 R. (H. L.) 76). It has been held that it cannot be constituted anew with the effect of equalising diligence (see *infra*, III.).

For the purpose of challenging transactions under the Act 1696, c. 5, the effects of notour bankruptcy continue until the debtor regains solvency (Mackellar, 1791, Mor. 1114; Bell, *Oct. Cases*, 22; Bell, *Com.* ii. 169).

"After a person has been legally rendered bankrupt by proceedings at the instance of one creditor, the bankruptcy forms a *jus quæsitum* to all his creditors, which cannot be removed either by a transaction between the bankrupt and the creditor who uses the diligence, or by the judgment of a Court in which they alone are parties" (*M'Hardy*, 1833, 11 S. 735, per L. Corehouse.) Thus, where an execution of search was reduced at the instance of the trustee under a trust deed granted by the bankrupt within sixty days previously, it was held competent for a creditor, notwithstanding, to found on it as evidence of notour bankruptcy in an action to reduce the trust deed (*M'Hardy, supra*). So the abandonment by the creditor using it of the diligence whereby the notour bankruptcy is constituted, does not prevent other creditors availing themselves of such constitution (Mackellar, *supra*).

III.—Effect of Notour Bankruptcy in equalising Diligences.

The Act 1696, c. 5, while placing restraint on a bankrupt's power of dealing with his estate, contained no provision affecting the right of creditors to acquire preferences by diligence. Provisions on the subject were, however, made by the Act 12 Geo. III. c. 72, and the subsequent Sequestration Acts. The existing enactment is contained in the 12th sec. of the Bankruptcy Act, 1856, which provides that "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu* as if they had all been used of the same date."

The application of this section extends to companies registered under the Companies Acts where they are rendered notour bankrupt (*Clark*, 1884, 12 R. 347).

The *pari passu* ranking is not merely of arrestments with arrestments and poindings with poindings, but operates to equalise all diligences of either class. The statutory period falls to be computed according to the rule in the 5th sec. of the Act, which provides that "periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run." In order, therefore, that an arrestment or poinding may be saved from the operation of the 12th sec., sixty free days must have elapsed exclusive of the day on which notour bankruptcy is constituted. Thus, if the date of notour bankruptcy be the 30th June, all arrestments and poindings executed during that or the preceding month will rank *pari passu*, while diligence executed on 30th April will have a preference (Goudy on *Bankruptcy*, 82, 114; *Scott*, 1839, 2 D. 206; *Stiven* 1891, 18 R. 422; *Wilson*, 1891, 19 R. 219; Kinnear on *Bankruptcy*, 8).

By sec. 108 of the Bankruptcy Act, 1856, it is declared that "sequestration shall as at the date thereof be equivalent to an arrestment in execution and decree of furthcoming, and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt, on or after the sixtieth day prior to the sequestration, shall be effectual." Where arrestments or poindings are executed more than sixty days prior to sequestration, and are therefore not rendered entirely ineffectual by the above provision, the question arises whether the

sequestration, if supervening within four months of notour bankruptcy, is, by virtue of its operation as an arrestment and poinding, entitled to rank *pari passu* with all such diligences as have been executed not earlier than sixty days prior to the notour bankruptcy, with the result of preventing any preference over the general body of creditors being created by such diligences. On a construction of the 12th and 108th sec., the sequestration would seem to have this equalising effect (see per L. Deas in *Wyper*, 1861, 23 D. 628, and in *Nicolson*, 1872, 11 M. 179; *Mitchell*, 1881, 8 R. 875; *Galbraith*, 1885, 22 S. L. R. 602).

In order to obtain the benefit of the *pari passu* ranking within the statutory period, it is not essential that diligence be actually executed, it being provided (s. 12) that "any creditor judicially producing in a process relative to the subject of such arrestment or poinding [*e.g.* a process of forthcoming, poinding and sale, or multiplepoinding], liquid grounds of debt or decree of payment within such period, shall be entitled to rank as if he had executed an arrestment or a poinding" (*Sangster*, 1857, 20 D. 355; *Clark*, 1884, 12 R. 347; Bell, *Com.* ii. 75; see *Bald*, 1859, 21 D. 473). Arrestments used on the dependence of an action or in respect of an illiquid debt within the statutory period, must be followed up [*i.e.* by proceedings to obtain decree] without undue delay (s. 12; *Mitchell*, 1881, 8 R. 875; *Benhar Coal Co.*, 1883, 10 R. 558). Undue delay is a question of circumstances (*Mitchell, supra*).

Provision is also made by sec. 12 for the case of an arresting or poinding creditor completing his diligence by forthcoming or sale within the statutory period, before other creditors have done diligence or judicially asserted their right to a *pari passu* ranking. It is thereby enacted that "in case the first or any subsequent arrester shall in the meantime obtain a decree of forthcoming and preference, and thereupon shall recover payment, or a poinding creditor shall carry through a sale, he shall be accountable for the sum recovered to those who, by virtue of this Act, may be eventually found to have a right to a *pari passu* ranking thereon, and shall be liable to an action at their instance for payment to them proportionally, after allowing out of the fund the expense of recovering the same" (see as to form of action, *Dobbie*, 1854, 16 D. 881; *Bald*, 1859, 21 D. 473; *Wood*, 1891, 18 R. 382). A poinding or arresting creditor who fails to recover payment of his whole debt through having to admit other creditors to an equal participation with him under this provision, is entitled to do diligence anew for the balance of his debt (*Gallacher*, 1876, 13 S. L. R. 496).

With regard to arrestments executed more than four months subsequent to the constitution of notour bankruptcy, it is provided (s. 12) that they shall not compete with those used within the sixty days or four months, "but may rank with each other on any reversion of the fund attached, according to law and practice." No similar provision is made regarding poindings after the four months (see Goudy on *Bankruptcy*, 117 (note *b*), for opinion that they are included by implication within the scope of the clause quoted). It has been held in a recent case, that for the purpose of equalising diligence the Statute contemplates one constitution of notour bankruptcy only. The debtor had there been rendered notour bankrupt by the expiry of a charge without payment, and the creditor thereafter carried through a poinding and sale. Another creditor claimed to be ranked *pari passu* on the proceeds of the sale within four months of its date, but more than four months from the original constitution of notour bankruptcy, contending that by the poinding and sale notour bankruptcy had been constituted anew to the effect of giving a *pari passu* ranking to

creditors compearing within four months thereof. The Court negatived this view, holding that the provision in sec. 9 of the Act as to constituting notour bankruptcy anew is applicable only for the purpose of creating a foundation for sequestration (*Wood*, 1891, 18 R. 382).

IV.—Challenge of Preferences to Creditors under the Act 1696, c. 5.

As already mentioned, this Statute, in addition to introducing certain tests of notour bankruptcy, strikes at preferences granted by the debtor to any of his creditors at or after his becoming bankrupt, or within the space of sixty days prior thereto. The text of the Act will be found above (page 2). The period of sixty days is computed according to the common-law rule, which differs from the rule under the Bankruptcy Act, 1856 (see *supra*, III.). "Either the day of bankruptcy (counting from it) is not reckoned, or the day of giving the preference (counting from it); but in either case, in conformity with the maxim, *dies inceptus pro completo habetur*, the sixty days are held to have expired the moment the sixtieth day is begun" (Goudy on *Bankruptcy*, 82). Thus, where notour bankruptcy was constituted on 30th May, an endorsement of a bill made on 31st March was held beyond the sixty days, and not subject to challenge (*Blaikie*, Jan. 21, 1809 F. C.). With regard to deeds requiring sasine or other proceeding for their completion, the provision of the Statute is now superseded by that contained in sec. 6 of the Bankruptcy Act, 1856, which declares that the date of a deed under that Act, or under the Act 1696, shall be "the date of recording of the sasine, where sasine is requisite, and, in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall, in the particular case, be requisite for rendering such deed completely effectual" (see as to questions under earlier law, Goudy on *Bankruptcy*, 105).

Although the Act of 1696 is directed against "fraudfull alienations," it is not necessary, in challenging transactions under it, to prove actual *animus fraudandi* on the part of the bankrupt (*Blincow's Tr.* 1828, 7 S. 124; *Matthew*, 1867, 5 M. 961, per L. P. Inglis; *Loudon*, 1877, 5 R. 293, per L. Shand; *Marshall*, 1794, Mor. 1144). Even proof of intention to give a preference, or of contemplation of bankruptcy by the debtor at the time, does not seem essential (*ib.*). Nor is it necessary to prove that the creditor receiving the preference acted collusively (*Blincow*, *supra*, and 7 W. & S. 26; *Scougall*, 1828, 6 S. 494). It is not settled, however, whether the rule of the Statute is absolute to the effect of voiding all transactions within its scope which operate *de facto* as preferences, irrespective of the question of *bona fides* on the part of granter and grantee (*Loudon*, *supra*; see *Fraser*, 1889, 16 R. 740, per L. Young). Proof of fraud or collusion will be necessary where the parties conspire to create a preference under the guise of a transaction which does not *primâ facie* fall under the Act, such as a transaction ostensibly in the ordinary course of trade.

Subject to what is said below as to the classes of transactions which are recognised as outwith the statutory rule, it may be stated that the scope of the Act is not in any way limited by the form in which the preference is given. The preference may be by way of direct transfer of the debtor's estate, *e.g.* the endorsation of a bill or cheque (*Nicol*, 1882, 9 R. 1097; *Carter*, 1886, 13 R. 698), or by the discharge of a debt (*Renton & Gray's Tr.*, 1880, 7 R. 951), or the renunciation of a right, such as the cancellation of a back-bond qualifying an absolute disposition (Bell, *Com.* ii. 197; *Keith*, 1795, Mor. 1163); or it may be by indirect methods. The following additional instances may be

given by way of illustration:—The granting of a lease (*Morrison*, 1854, 16 D. 1125; *Kyd*, 1890, 17 R. 1051); a mortage of a ship (*Anderson*, 1859, 21 D. 230); abandonment of a competent defence to an action (*Wilson*, 1853, 16 D. 275; *Laurie*, 1867, 6 M. 85); prepayment of a debt (*Speir*, 1825, 4 S. 94, 5 S. 680; *Blincow's Tr.*, 1828, 7 S. 124 and 758, 7 W. & S. 26; *Rose*, 1868, 6 M. 960); selling property to a third party on agreement for handing the price to the favoured creditor (*Barbour*, 1823, 2 S. 309; *Ramsay*, 1829, 7 S. 749); selling goods to a creditor in order that he may plead compensation on the price (Bell, *Com.* ii. 124, 199; *Marshall*, 1794, Mor. 1144); granting security to a third party who arranges to undertake liability as cautioner for the favoured creditor's debt (*Miller*, 1822, 2 S. 71, 2 W. & S. 579). A trust deed for creditors may be reduced by any non-acceding creditor (*Douglas*, 1832, 10 S. 647; *Wright*, 1839, 1 D. 641; *Mackenzie*, 1868, 6 M. 833).

A mere voucher of debt, used as founding a claim to an ordinary ranking on the debtor's estate, is not struck at (*Matthew*, 1867, 5 M. 957; *Williamson*, 1882, 9 R. 859). But where a bill acceptance was used by a creditor for obtaining a preference by competing in a poinding, it was held liable to challenge (*Strang*, 1821, 1 S. 1; see per L. P. Inglis in *Matthew, supra*). And a bond of corroboration, accumulating interest and penalties and putting the creditor in a position to adjudge, was also set aside (*Mackellar*, 1791, Mor. 1114).

It will not exempt a deed from challenge under the Act, that it has been granted by a foreigner (*Blackburn*, 22 Feb. 1810, F. C.), or in a foreign country (*Sym*, 1758, Mor. 1137); nor that the preferred creditor is a foreigner resident out of the jurisdiction (*White*, 1843, 5 D. 1148; *Hunter*, 1825, 3 S. 402).

To render a transaction liable to challenge under the Act, it must be granted to a creditor in an existing debt. Thus gratuitous alienations, although liable to challenge at common law or under the Act 1621, c. 18, do not fall within the Act of 1696, which only strikes at acts by the bankrupt "in favours of any of his creditors either for their satisfaction or farder security in preference to other creditors" (*Fraser*, 1889, 16 R. 740; *Hamilton*, 1743, Mor. 1092; *Ferguson*, 1869, 7 M. 592). But it will not render a transaction exempt that a third party is interposed as the direct grantee in order to disguise the real nature of the transaction (*Barbour*, 1823, 2 S. 309; *Ramsay*, 1829, 7 S. 749). (See *infra, Nova debita.*)

The transaction challenged must be granted voluntarily and in satisfaction or further security. It may be now taken as the rule of construction developed by a long course of decisions, that the Act is intended to strike at transactions by which favoured creditors are given, not specific implement of a matured debt, but some *surrogatum* or security therefor. In the leading case of *Taylor* (1855, 17 D. 639) the following *dictum* was concurred in by the whole Court:—"We think that by that Statute the Legislature did not intend to disable persons in the predicament therein set forth from fairly paying their debts as these became payable,—or from fairly and strictly performing their obligations *ad factum prœstandum* as these became prestable. It is legally necessary for such obligants so to pay their debts and to perform their obligations; and it was not the object of the Statute to disable them from doing without compulsion what the law itself would compel them to do. What the Legislature intended by the Statute was to disable a debtor who is in the predicament therein set forth and unable to pay his debts, from entering spontaneously into some new transaction with a favoured creditor, whereby, in lieu of—or as a substitute for—regular

payment of a debt in cash, the debtor grants and the creditor receives a transference of some other funds or effects forming part of the debtor's estate." (See also *Gibson*, 1833, 11 S. 929, per L. Fullerton; and *Stiven*, 1871, 9 M. 923, per L. P. Inglis.)

This rule of construction is illustrated by the various kinds of transactions which have come to be recognised as beyond the scope of the Act, although taking place within the statutory period. These are usually classed under the following heads,—although the classification does not correspond to any definite distinctions in the principles governing the different classes,—viz.: 1. Cash payments. 2. Transactions in the ordinary course of trade. 3. *Nova debita*.

1. *Cash Payments.*—Payment in cash of money obligations presently due has always been regarded as outwith the scope of the Act (*Forbes*, 1751, Mor. 1128; *Ramsay*, 1829, 7 S. 749; *Gordon*, 1838, 1 D. 1). Such payment is neither "satisfaction" nor "farder security" in the sense of the Act, according to the rule of construction already mentioned, but is specific implement of the obligation according to its terms (Bell, *Com.* ii. 201; *Gibson*, 1833, 11 S. 930, per L. Fullerton). "A man, though he knows that he is insolvent and cannot pay all his creditors, may nevertheless prefer any of them whom he pleases, and pay their debts in full, provided their debts are due, and due in actual money. He is at liberty to do this, though he is not at liberty to give them any pledge in security of their debts" (per L. Young in *Coutts' Tr.*, 1886, 13 R. 1112).

If the payment be anticipatory and not on account of a matured debt, it will, in the general case, fall within the Act as being "satisfaction or farder security" (*Speir*, 1825, 4 S. 94, 2 W. & S. 253, 5 S. 680; *Blincow's Tr.*, 1828, 7 S. 124 and 758, 7 W. & S. 26; *Rose*, 1868, 6 M. 960; see *Guild*, 1857, 20 D. 3 and 392). It has, however, been said that "when a party has money in his hands for which he has no immediate use, he may perhaps purchase up his own bill before it becomes due" (*Speir*, *supra*, per L. Glenlee). And the course of dealing between the parties, or custom of trade, may form relevant considerations in determining whether a prepayment is, in particular circumstances, struck at by the Act (per L. P. M'Neill in *Guild*, *supra*). Collusive transactions, as where the parties conspire to convert the debtor's property into cash available for the creditor's payment, will not be protected from challenge (*Bain*, 1760, Mor. 907; *Mitchell*, 1834, 12 S. 802; *Shaw's Tr.*, 1887, 15 R. 32). It is not in itself enough, however, that the debtor has paid the money with the intention of preferring the creditor in question, even though he has sold part of his property in order to obtain the cash to do so; nor that the creditor knew the debtor to be insolvent when he received payment (*Coutts' Tr.*, 1886, 13 R. 1112).

The benefit of the present exception extends to payments made by bank notes, cheques by the debtor (as distinguished from endorsements (*Carter*, *infra*)), bank drafts and bills, Exchequer and Navy bills, and other mercantile paper which is commonly paid and received as cash (Bell, *Com.* ii. 202; *Blincow's Tr.*, 1828, 7 S. 124; *Dixon*, 1828, 7 S. 132; *Carter*, *infra*). But payments by bill or endorsement of cheques are not protected (*Carter*, 1886, 13 R. 698), unless made in the ordinary course of trade (as to which, see *infra*), or perhaps where the creditor resides abroad, and the means of remittance are therefore restricted (see per L. Shand in *Carter*, *supra*). Consignation of money is in certain cases equivalent to payment, so as to entitle the creditor to receive the consigned money though the debtor has become notour bankrupt within sixty days of the consignation (see *Mitchell*,

1834, 12 S. 802; *Guild*, 1857, 20 D. 3 and 392; *Stiven*, 1891, 18 R. 422; *Gordon*, 1838, 1 D. 1). But the mere setting apart or separating the money for the creditor's use in the debtor's hands, without actual delivery thereof, will not in the ordinary case be regarded as equivalent to payment in a question under the Act.

2. *Transactions in the ordinary course of Trade.* — To deny this exception would lead to the disturbance of business relations in a way not intended by the Statute. During the statutory period the imminence of notour bankruptcy may be unsuspected, while the prospect of its occurrence can never be a certainty; and were all business transactions within that period to be struck at upon its occurrence, the result would be to paralyse trade. The continuance of ordinary business dealings, moreover, cannot be regarded as containing the ingredient proscribed by the Act, which is the taking of extraordinary measures to satisfy creditors whose claims cannot be met by the debtor in ordinary course. The distinction may be illustrated by the following case. A manufacturer who held bills granted by customers, endorsed these over to a creditor in payment of the latter's claim. The transaction was defended as being in accordance with the bankrupt's own business practice, followed during several years; but this practice was itself the outcome of his financial stringency; and the endorsation of the bills was held to be out of the ordinary course of business dealing (*Horsbrugh*, 1885, 12 R. 1171). It was remarked: "The ordinary course of business in the case of a trader who is in a state of solvency, would have been that every one of these bills should have been lodged with his banker and placed to his credit, and when he paid his creditors he would have paid them by cheque on his banker. That would have been the ordinary course of business; this is an extraordinary course of business, and only resorted to because the bankrupt was in labouring circumstances" (per L. P. Inglis).

It is not possible to lay down precise categories for the transactions falling under the present exception, as much will often depend on the circumstances of the case, such as the nature of the particular business in which the transactions arise. Deliveries of goods in implement of prior contracts in ordinary course are not affected by the Act, even although a long period may have intervened (*Gibson*, 1833, 11 S. 916: *Taylor*, 1855, 17 D. 639; *Miller's Tr.*, 1862, 24 D. 821; see *infra*, *Nova debita*). A transaction may be protected under this exception although it has the effect of incidentally conferring a preference on a creditor for a prior debt. Thus, where a bleacher in ordinary course received goods to bleach within the sixty days from a manufacturer who was due him an account for work already done, it was held that the bleacher's lien fell to be allowed its full effect, with the result that he thereby obtained a security over the goods sent not only for the cost of the work done upon them, but for the prior account (*Anderson's Tr.*, 1871, 9 M. 718). Similarly, the consignment of goods to a factor in ordinary course is legitimate, although he may thereby obtain security under his right of lien for an existing balance due by the principal. But it would, of course, be otherwise if the real object of the consignment were to create such security (Bell, *Com.* ii. 205). If the factor, on the other hand, be due his principal the value of goods sold on his behalf, and consign to the latter goods against such value, the transaction may be justified "if the goods were sent according to the principal's order, or even if sent in the usual course of the factor's employment" (Bell, *Com.*, *ut supra*). It has been held to be fairly within the ordinary course of business, in certain circumstances, for a purchaser to return to a merchant

or manufacturer goods bought for which he finds he has no use. Thus, where a lathe was in this way returned to a manufacturer after being retained for six weeks, the Court sustained the transaction on being satisfied of the *bona fides* of the parties. Such proceedings, however, will always be carefully scrutinised, as unusual and forming a likely cover for fraud.

An important question under this head relates to payments made by bills drawn, or the endorsation of bills, cheques, or other negotiable instruments by the debtor. Such a payment is in effect a transfer of part of the debtor's assets to the receiver, and, unless entitled to protection under the present exception, falls within the scope of the Act. The case of *Horsbrugh* above referred to affords an instance of this. Where, again, an insolvent firm of woolbrokers endorsed a cheque to a customer in payment of a prior debt, the transaction was set aside (*Carter*, 1886, 13 R. 698). But where a bill is due at a bank, and the debtor takes it up by sending to the bank to be discounted another bill for the amount, the Act has been held not to apply (Bell, *Com.* ii. 204; *Jamieson, ib. cit.*). And payments by endorsation of bills in the ordinary course of a running account between a banker and his customer, or between merchants, or a principal and agent, will be effectual (Bell, *Com.* ii. 204; *Stein's Crs.*, 1791, Mor. 1142; *Richmond*, 1805, M. Bankruptcy App., No. 24; *Dundas*, 1808, M. *ib.*, No. 28; *Blincow's Tr.*, 1828, 7 S. 124; 1831, 9 S. 317; 1833, 7 W. & S. 26). But if a bill be past due and protested, the endorsation of another bill in extinction of it will fall under the Act (Bell, *Com.* ii. 204; *Blaikie, ib. cit.*).

Where the debt or obligation in respect of which a payment by bill is made or goods are delivered is not due or prestable, and the payment or delivery is anticipatory, and therefore not in ordinary course, it will not be entitled to the benefit of the present exception (*Blincow's Tr., ut supra*: *M'Farlane*, 1870, 9 M. 370; Bell, *Com.* ii. 204; see *Speirs*, 1825, 4 S. 94: 1826, 2 W. & S. 253; 1827, 5 S. 680). Thus, where the charterers of a ship, a few days after the execution of the charter-party, accepted at the request of the shipowners a bill at fourteen days to be imputed towards the first instalment of the freight when it should become due, and the bill was paid, but the charterers became bankrupt within sixty days of its date and before any part of the freight had become payable, it was held that the bill was reducible under the Act (*M'Farlane, ut supra*). Again, where the transaction, although ostensibly in course of trade, is attended with circumstances showing collusion or a contrivance to evade the Act, it will be open to challenge (Bell, *Com.* ii. 204); as where a debtor sells goods to his creditor to enable him to set off the debt due to him against the price, and so to obtain satisfaction to the extent of the value of the goods (*Stewart*, 1832, 11 S. 171; see *Dawson*, 1840, 2 D. 525); or where the bill given in payment is of so distant a date as to show it to be a security rather than payment (Bell, *Com.* ii. 204). Where a mercantile company, having purchased goods as agents for an employer, sold them without his knowledge, and thereafter, within sixty days of their bankruptcy, transferred to him *ex proprio motu* a quantity of other goods belonging to them in satisfaction of his claim, the transfer was held reducible under the Act (*Scougall*, 1828, 6 S. 494). Again, where a commission agent appropriated the proceeds of a bill remitted to him to discount, and thereafter, within the statutory period, remitted to his principal an acceptance of another firm and a bill of lading of goods shipped abroad, with relative draft against the shipment, the Act was applied (*White*, 1843, 5 D. 1148).

3. *Nova debita.*—This class of exceptions embraces all transactions

in which the conveyance or other deed or act of alienation by the bankrupt is granted or done in pursuance of an obligation undertaken for a fair and present value given (Bell, *Com.* ii. 205; Goudy on *Bankruptcy*, 96). The Statute strikes at deeds granted voluntarily in favour of "creditors" in preference over other creditors, and thus postulates that the grantee is a person occupying the position of a creditor towards the bankrupt prior to the inception of the alienation challenged. This postulate is obviously absent in cases where the act of alienation only gives to the recipient the very thing which, under the particular transaction between him and the bankrupt, he has bargained to get in return for a present value given by him, and that whether the thing is received by him *unico contextu* with the value given, or is made over to him subsequently in implement of an absolute and immediate obligation to that effect undertaken by the bankrupt in consideration of such value given. In neither of these cases can it be said that the bankrupt's act partakes of the nature of a preference to an already existing creditor. Nor can it be said to confer a preference on the grantee by way of "satisfaction" or "further security" in the sense of the Statute. Like a payment in cash of a matured money debt, it merely gives him specific implement of a debt immediately exigible by him. The simplest instances of *nova debita* are sales for a fair price paid (*Cranstoun*, 1830, 8 S. 425; *Gibson*, 1833, 11 S. 916; *Taylor*, 1855, 17 D. 639; *Miller's Tr.*, 1862, 24 D. 821), or loans upon specific security instantly constituted in exchange for the advance (*Bank of Scotland*, 7 Feb. 1811, F. C.; *Renton & Gray's Tr.*, 1880, 7 R. 951).

The term *nova debita* has sometimes been used as applicable to transactions originating within the sixty days. There seems to be no special principle involved in this restricted use of the term, and no special convenience in adopting it as matter of nomenclature. From the definition given above (which is in accordance with the more usual use of the term) and the statement of the general principle on which this class rests, it will be seen that the class extends to (1) cases in which the contract has been made and completed either during the sixty days or after the actual constitution of notour bankruptcy; (2) cases in which the contract has been made prior to the sixty days, and completed during their currency or after actual bankruptcy: (3) cases in which the contract has been made during the sixty days, and completed after actual bankruptcy (Goudy on *Bankruptcy*, 97). The essential element is that the mutual obligations of the contract be undertaken *unico contextu*: and if this be so, the transaction does not lose it character of *novum debitum* by the lapse of an interval of time prior to its execution. Thus, where money was lent on the faith of a specific heritable security bargained to be given therefor, and the bond was not granted for two months thereafter, and sasine thereon was not taken for five years and until the debtor had been sequestrated, it was held that the bond was not reducible under the Act (*Cormack*, 1829, 7 S. 868). Similarly, where a disposition was granted and infeftment taken within sixty days of the granter's notour bankruptcy, following on missives of sale entered into five months previously, the Act was held not to apply (*Cranstoun*, 1830, 8 S. 425). Again, where a party bought and paid for wine which was set apart for him by the sellers, and, after a lapse of several years another part of the seller's stock was by agreement substituted for the first, and was ultimately forwarded to the buyer within sixty days of the seller's bankruptcy, the transaction was held not reducible by the seller's trustee (*Gibson*, 1833, 11 S. 916).

The consideration given to the bankrupt must be a "fair and present

value" (Bell, *Com.* ii. 205; *Brugh*, 1717, Mor. 1125: *Johnstone*, 1751, Mor. 1130; see *Cranstoun*, 1830, 8 S. 425).

The principles governing the exception of *nova debita*, as above generally stated, have only been developed in a long course of decisions, in the earlier of which they obtained but partial recognition. The simplest cases falling under the exception, such as a sale for a present price paid, where the contract is performed on both sides *uno contextu*, have always been admitted. But more difficulty arose in applying the rule to cases where transactions, originally entered into before the sixty days, were subsequently completed during their currency, or after actual notour bankruptcy. The completion of the transaction in such cases may be (1) the act of the grantee of the conveyance or other deed of alienation by the bankrupt, or (2) the act of the bankrupt himself in implement of an obligation undertaken by him. These will be dealt with separately; and in regard to the second class it will be necessary to carefully distinguish what kinds of obligations a bankrupt may give implement of notwithstanding the Statute.

(1) *Completion of Transactions after the beginning of the Sixty Days by the Act of the Grantee.*—The Act of 1696, c. 5, declares that for the purposes of the Act, all dispositions, heritable bonds, or other heritable rights whereupon infeftment may follow, granted by a bankrupt, shall only be reckoned to be of the date of the sasine lawfully taken thereon (see 19 & 20 Vict. c. 97, s. 6). It was at first held that the object of this part of the Statute was, in every case, to prevent securities from being kept latent, and that, accordingly, wherever the constitution of the real right was delayed, the *jus in re* was separated from the obligation, the creditor remained a mere unsecured creditor, and that where the completion of the security took place within the sixty days, it was truly of the nature of a security given for a prior debt (Bell, *Com.* ii. 206–7; *Grant*, 1717, Mor. 1228–9). This view of the effect of the Act was, however, subsequently departed from, and it was settled that the provision declaring the date of the infeftment to be the date of the deed only applies to transactions of such a nature otherwise as to be struck at by the Act, and that it does not affect transactions of the nature of *nova debita* (Bell, *Com.* ii. 207; *Johnston*, 1751, Mor. 1130: *Mitchell*, 1799, Mor. App. Bank. 10: *Bank of Scotland*, 7 Feb. 1811, F. C.: *Cormack*, 1829, 7 S. 868; *Cranstoun*, 1830, 8 S. 425, 6 W. & S. 79: *Mansfield*, 1833, 11 S. 813; 1 S. & M'L. 203; *Kettle's Tr.*, 1884, 22 S. L. R. 520; *Scottish Prov. Institution*, 1886, 16 R. 112). This may be illustrated by the following two cases:—If A. contracts to lend B. £500 on the specific security of a bond and disposition in security over B.'s property of X., and receives the bond in exchange for the money, but does not record it until within sixty days of B.'s notour bankruptcy, the validity of the security is not affected by the Act, in respect the transaction is a *novum debitum*. If, on the other hand, A. lends £500 to B. without security, and thereafter B., before the sixty days, voluntarily grants a bond over his property to A. in security of the debt, which A. does not record until after the sixty days have begun, then the bond will be held to have been granted of the date of such recording, and will be reducible under the Act. The rule is the same under the existing provision of the Bankruptcy Act, 1856 (s. 6), which makes the date of a deed under the Act of 1696 "the date of recording of the sasine, where sasine is requisite, and, in other cases, of registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering such deed completely effectual (see Bell, *Com.* ii. 208).

(2) *Completion of Transactions after the beginning of the Sixty Days*

by the Act of the Bankrupt.—There is an obvious difference between acts by the grantee of a deed done outwith the control of the bankrupt, as by the recording of an infeftment, and acts done by the bankrupt himself; and after the former class had been held exempt from the operation of the Act, the view was taken that the latter, as being voluntary acts, in all cases fell under its provisions. According to this view, the term *voluntary* was held to apply to every act done by the bankrupt, whether spontaneously or in implement of a binding obligation subsisting against him. It was, however, ultimately settled that the Statute does not apply to acts done by the bankrupt in specific implement of onerous contractual obligations immediately enforceable against him (*Cranstoun*, 1830, 8 S. 425, 6 W. & S. 79; *Gibson*, 1833, 11 S. 916; *Taylor*, 1855, 17 D. 639; *Miller's Tr.*, 1862, 24 D. 821; *Renton & Gray's Tr.*, 1880, 7 R. 951; *Lindsay*, 1880, 7 R. 1036; *Cowdenbeath Coal Co.*, 1895, 22 R. 682). Such acts are not voluntary in the sense of the Statute. "You cannot say that a deed is voluntary which a party is bound to execute, and which the law will compel him to execute. A voluntary deed is one which the party is at liberty to execute or not as he pleases" (per L. Wynford in *Cranstoun, ut supra*). Nor can such acts be said to be *in satisfaction* to the creditor in the statutory sense, since (like the payment of a money debt in cash) they give him the specific performance to which he is entitled, and not some *surrogatum* or substitute therefor. In some of the more recent decisions on this branch of the law, the rule of the authorities last cited has been illustrated by contrast in various cases, where the Act has been held to invalidate deeds of a bankrupt done in pursuance not of a specific prior obligation, but of an obligation merely general in nature. This is an important distinction, and is more fully dealt with below.

The kinds of obligations of which a bankrupt is entitled to give specific implement will vary according to the contract out of which they arise. The obligation, *e.g.*, may be to deliver moveables, or convey heritage in implement of a contract of sale, or to grant securities thereon in implement of a contract of loan, or under the provisions of a marriage settlement. Thus, in the leading case of *Cranstoun*, 1830, 8 S. 425, 6 W. & S. 79, a creditor agreed by missives of sale to buy heritage belonging to his debtor at a certain price. After an interval of five months, and within sixty days of the seller's bankruptcy, he granted a disposition in implement of the missives, the price being (by a *bonâ fide* agreement beyond the sixty days) settled by setting off against it *pro tanto* a previously existing claim by the purchaser against the seller. The disposition was held not reducible under the Act. L. Balgray, who gave the leading judgment in the Court of Session, said: "It never has been held since *Watson's Crs.*, 31 July 1724 (Edgar, p. 117), that any insolvent party might not, as late as the last hour before bankruptcy, make an onerous sale for a fair price. By such a transaction the creditors sustain no injury. If the subject be gone, the price comes in place of it." Again, in the case of *Taylor*, 1855, 17 D. 639, A. agreed to take C. into partnership on the expiry of an existing copartnery between A. and B. On the day fixed C. paid his stipulated share of capital. A few days thereafter, A., by a new arrangement, sold to C. the whole stock-in-trade, business, etc., C. getting credit in settling the price for the money already paid under the partnership arrangement. Three days afterwards, and within sixty days of A.'s notour bankruptcy, C. obtained possession of the subjects of sale from A. It was held by the whole Court that the transference within the sixty days having been in specific implement of a valid obligation *ad factum præstandum*, was not "voluntary" or "in

satisfaction" in the sense of the Statute, and could not be set aside. In the case of *Miller's Tr.*, 1862, 24 D. 821, the bankrupts, prior to the sixty days, wrote a letter to the defender, saying: "We have this day sold you 100 tons guano at £6 per ton, payment to be made by your acceptance at four months. The guano to be delivered as required. We, however, reserve right to repurchase at same price at any time during the currency of the acceptance." The acceptance was granted and deposited with a bank, who advanced money on it, and it was duly retired by the defender. The guano was delivered to the defender six days before sequestration of the bankrupts. It was held that the delivery of the guano, being in fulfilment of a legal obligation undertaken *simul ac semel* with the advance of the money, was not a contravention of the Act, and that whether the transaction recorded in the bankrupts' letter was a sale or a loan. In the case of *Renton & Gray's Tr.*, 1880, 7 R. 951, a solicitor, R., whose firm of R. & G. acted for two clients, S. and D., obtained payment from D. of the sum contained in a heritable bond over his property held by S., falsely representing to D. that S. required repayment, and to S. that D. desired to repay the loan. R. offered to S., as a reinvestment, a bond over the house of his partner G., and, this having been agreed to, G., within sixty days of the sequestration of his and the firm's estates, granted the bond to S., who of even date executed a discharge of the bond by D. The trustee on G.'s estate having brought a reduction both of the bond by G. and the discharge, as having been granted to secure a prior debt due by G. to S., arising out of the appropriation by his partner R. of the money received from D. on behalf of S., it was held that the transactions were *nova debita*, and reduction was refused. The Lord Ordinary (L. Rutherfurd Clark) refused reduction of the discharge on the ground that G.'s trustee had no title to challenge it, but reduced the bond on the ground that G. had received no value for it; but the Court, reversing the latter part of the judgment, held that the money received by his firm from D. formed good consideration to G., and that the granting of the bond was a specific *pars contractus*. In *Lindsay*, 1880, 7 R. 1036, M. & Co. (the bankrupts), who were part owners and ships-husbands of a vessel abroad, got an advance, before the sixty days, from A. & R. upon the inward freight, and agreed to place the vessel in the hands of A. & R. to collect the freight for their reimbursement. On the arrival of the vessel, A. & R. requested M. & Co. to receive and remit the freight, which they did within the days of bankruptcy. It was held that, as the payments by M. & Co. were made in specific implement of an agreement undertaken more than sixty days before bankruptcy, they were not affected by the Statute; and an opinion was expressed by L. Shand that it would not have made any difference had the original transaction been within the sixty days. His Lordship said: "If a merchant, in the ordinary course of business, advances money to another a month before bankruptcy, on the footing that it will be repaid within a fortnight or so, and at the same time gets a security that will enable him to recover the amount of the advance, and recovers the amount through that security, it appears to me to be unchallengeable under the Statute." In the older case of *Mitchell*, 1799, Mor. App. Bankrupt, 10, a husband, by antenuptial marriage contract, bound himself to infeft his wife for her liferent, in case of survivancy, in certain property belonging to him in which he himself was not at the time infeft. Two years thereafter, and within a month of his notour bankruptcy, he obtained himself infeft, and of the same date his wife was infeft on the clause in the contract. It was held that the title so made up could not be reduced under the Act, the husband's infeftment not being his own

voluntary act, seeing that his onerous obligation in the marriage contract would have entitled the wife to complete her right by expeding infeftment in her husband's person as well as her own.

An important class of cases, in which the application of the Act has frequently had to be considered, consists of those in which a security is constituted within the days of bankruptcy under a contract previously entered into. Of course, if no security have been stipulated for originally, the voluntary granting of one by the bankrupt clearly falls within the Act. But even where the lender originally stipulates for security, the authorities have drawn a distinction between (1) the case of the bankrupt giving a security specifically stipulated for, and contracted to be immediately given as part of the original bargain; and (2) the case of the bankrupt granting a security in fulfilment of an obligation of a general kind to secure the debt. The general doctrine deduced from the cases on the subject is stated by Mr. Bell (*Com.* ii. 211) to be: "1*st*. That wherever money is paid or advanced, or property made over in consideration of a general promise of security, not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted, and in its true intent and meaning the rule of the Statute is understood to apply to the security, when it comes to be granted, as being truly a security for a previous debt . . . 2*nd*. It has also been held that, wherever there is stipulated a specific security over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act." It is necessary to remark, however, that the distinction is not entirely between stipulating for a specific security and for security generally. As will be seen from the authorities below, not only must there be a specific security stipulated for, but it must be contracted to be given forthwith, as being really the basis on which the advance is made.

The general doctrine is elucidated in the following sentences from the opinion of L. P. Inglis in the case of *Stiven*, 1871, 9 M. 933: "An obligation of a general kind to give security is plainly nothing at all in itself. It is an obligation, no doubt, that the party is bound in honour to fulfil, but it is an obligation not applicable to any particular subject, and it is not in itself a specific obligation; and until it is made special in some way or other, it cannot be said to be a security for the debt at all. In that view, it is only when the so-called obligation is fulfilled that there comes to be any security. And, therefore, that is the point of time at which the security is granted; and if that point of time occur within sixty days of bankruptcy, the application of the Statute is clear, because that is security given within sixty days for a prior debt. But, on the other hand, if the party come under an obligation to do something immediately and unconditionally, it shall have the effect of creating a good security; and when I say come under an obligation, I mean nothing short of this, that he subjects himself to an obligation instantly and absolutely enforceable. When he comes under such an obligation as that, then the fulfilment of that obligation, although within sixty days, will not make a case under the Statute, because there the security is substantially granted before the sixty days, and at the same time as the debt is contracted. It is a security contemporaneous, in that point of view, with the contraction of the debt."

Accordingly, where money is advanced on the faith of a specific security to be granted for it forthwith, the transaction is a *novum debitum*, and if the debtor grants the particular security in implement of the bargain

within the sixty days, the security will not be reducible under the Act (*Bank of Scotland*, 7 Feb. 1811, F. C.; *Cormack*, 1829, 7 S. 868; *Miller's Tr.*, 1862, 24 D. 821; *Renton & Gray's Tr.*, 1880, 7 R. 951; *Lindsay*, 1880, 7 R. 1036; *Cowdenbeath Coal Co.*, 1895, 22 R. 682). "But the security granted is voidable where the obligation to grant it (1) is undertaken subsequent to entering into the contract, or (2) although *in gremio* of or contemporaneous with the contract, is only an obligation or promise in general terms to grant security, or (3) is an obligation to grant some specified class of security which fails of being sufficiently specific as to the subject-matter, or is indefinite as to the time of performance" (Goudy on *Bankruptcy*, 103). The following cases may be referred to as illustrating the rule formulated in the passage just quoted. In *Moncrieff*, 1851, 14 D. 200, a party, six months before bankruptcy, received an advance from a bank in exchange for his promissory note, along with a letter addressed by him to the bank binding himself at "any time required" to assign to the bank, in security of the advance, a certain bond and two policies of insurance, which he then deposited with the bank. Six days before his bankruptcy, he, upon the requisition of the bank, assigned the securities in question to them in terms of the letter of obligation. The assignation was held reducible under the Act. Here the security was perfectly specific, and the debtor had come under an enforceable obligation to grant it. The defect in the transaction was that, as the terms of the letter of obligation showed, "the instant granting of the security was not the consideration of the advance. There was no absolute stipulation for the security at the time of the advance: on the contrary, the borrowers were, by the terms of the missive, bound to grant the assignation at any time required. So far, then, from the granting of the security being the instant consideration for the advance of the money, the defenders were satisfied with the promissory note, and it was to be a matter of after consideration whether they should require the security or not" (per L. Fullerton, p. 204). A very similar question occurred in *Gourlay*, 1887, 14 R. 403, and was decided in the same way. The bankrupts had obtained an advance from the defender, in exchange for which they granted their promissory note, and deposited with the defender a certificate of certain shares, along with a letter stating that, "in consideration of" the advance, they made the deposit and bound themselves to transfer the shares to the defender at any time during the currency of the bill, if so desired by him. The securities were transferred in implement of this obligation within sixty days of bankruptcy. The Lord Ordinary (L. Kinnear) held the transfer not reducible, distinguishing the case from that of *Moncrieff* (*supra*), on the ground that the terms of the letter showed that the security upon which the defender made the advance was not the personal obligation in the promissory note, but the specific security of the shares in question. The Second Division of the Court, following the case of *Moncrieff*, reduced the transfer, on the ground that the Statute was excluded only where the security was stipulated for as "a simultaneous and contemporaneous security." In *Stiven*, 1871, 9 M. 923, a firm of merchants accepted accommodation bills drawn upon them by another firm, and received by way of security invoices of goods bearing to be sold by the drawers to the acceptors, but really intended as a security only. In accordance with the intention of parties, the goods remained in the possession of the drawers, subject to their control and disposal, and they were not delivered to the acceptors until within sixty days of the drawers' bankruptcy. The delivery was held to be struck at by the Act. In *Rhind's*

Tr., 1891, 18 R. 623, the Act was applied in somewhat similar circumstances. In *Gourlay*, 1875, 2 R. 738, the defender advanced £500 to P. & Co., who handed him in exchange a written obligation in these terms: "We have this day received from you £500, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Indian corn to the full value." P. & Co. then purchased grain in the market, and within sixty days of their bankruptcy handed delivery-orders therefor to the defender. The transaction was set aside. The obligation here implemented by the bankrupts was general in character, both as regards the subject-matter and as to the time of performance. In the recent case of *Paterson's Tr.*, 1891, 19 R. 91, the defenders, who were the testamentary trustees of a pawnbroker, entered into an agreement with a relative of the deceased which purported to grant to him a lease of the pawnbroking premises, with the stock of pledges therein, in order that he might carry on the business, he paying rent and interest on the stock, and binding himself, on receiving fourteen days' notice, to cede possession of the premises and the stock therein at the time. After some years, the lessee ceded possession within sixty days of his bankruptcy. It was held that the Act applied, in respect that the obligation of which performance had been made was not specific as to the stock (the *corpus* of which was necessarily a changing one), and also that, under the agreement, the time of performance was postponed and indefinite. In *Mansfield*, 1833, 11 S. 813, affd. 1 S. & M'L. 203, a loan was granted on the faith of heritable security over specific lands. Through the fault of the borrower, the bond given in exchange for the loan, and accepted by the lender under error, included a part only of the lands in question. The mistake was discovered after the borrower had been sequestrated, and in order to rectify it he granted a bond of corroboration over the whole lands. The Court by a majority held, *inter alia*, that the Act applied. In the House of Lords the judgment was affirmed, on the ground that the debtor was disabled by his sequestration from granting the bond of corroboration; but the opinion of L. Brougham was in favour of the application of the Act. (See the remarks on this case in Goudy on *Bankruptcy*, 101, where the application of the Act is doubted, on the ground that the bond of corroboration gave the lender the specific security he had stipulated for, and on faith of which he had advanced the money.)

Title and Interest to Challenge Preferences.—An *individual creditor* may challenge a preference if his debt have been contracted prior thereto (Bell, *Com.* ii. 194–5; *Man*, 1702, Mor. 1006; *Barclay*, 1783, Mor. 1151). This right does not fall by the occurrence of sequestration, although the trustee (as stated below) has a concurrent title to make the challenge; nor is it destroyed by an adverse interest in the general body of creditors (*Brown & Co.*, 1890, 18 R. 311; Bell, *Com.*, 5th ed., ii. 415, note 3). A *trustee in sequestration* has by Statute (19 & 20 Vict. c. 79, s. 11) a title to challenge for behoof of all creditors entitled to be ranked on the estate. Prior to 1856 the title of the trustee had been conceded by practice, provided he represented prior creditors who were themselves entitled to challenge. Now, however, this condition is unnecessary. A *liquidator* of a public company may, apparently, challenge preferences, provided he represents prior creditors (see *Clark*, 1883, 9 R. 1017). The title of a *trustee in cessio* has never been affirmed by the Court. The only reported case bearing on the subject is that of *Thomas*, 1866, 5 M. 198, where the title of a trustee suing a reduction of a promissory note and a conveyance of heritage was negatived generally by the interlocutor of the Court, although,

from the argument and opinions, the subject of question would seem to have been the title of the trustee to sue *quoad* the conveyance in the absence of a disposition *omnium bonorum* by the debtor. *A trustee under a private trust for creditors* cannot challenge in virtue merely of the conveyance by the debtor of his estate, but he may do so if the trust deed confers express power, and creditors, having themselves a title, accede thereto, and thus impliedly constitute the trustee their representative (*Fleming's Trs.*, 1892, 19 R. 542). The *bankrupt* cannot in his own right challenge preferences which he has granted. He may, however, acquire right from his creditors to do so where he is reinvested on composition, provided (1) he stipulates for and obtains a special assignation of the creditors' right to challenge, and (2) notice is given to the preferred creditors in course of the composition arrangement that the challenge is intended. The purchaser of a sequestrated estate under a deed of arrangement has no title to challenge preferences granted by the bankrupt without express assignation (*Smith*, 1889, 16 R. 392). But third parties who have obtained a prior disposition or assignation to the subject in question may do so (*Shaw*, 1747, Mor. 1150; *Wright*, 1839, 1 D. 641). An interest as well as a title is required to support the challenge, as in other actions. The transaction will be set aside only so far as the interest of the challenger extends (*Ker*, 1830, 8 S. 408); and the challenge will fail if it appear that it would confer no benefit on the pursuer, as where, *e.g.*, the reduction of a transaction would only have the effect of opening up the fund to the claim of some other person (*Dixon*, 1828, 7 S. 132; Goudy on *Bankruptcy*, 108).

Form and Effects of Challenge.—The Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), provides (s. 10): "Deeds made void by this Act, and all alienations of property by a party insolvent or notour bankrupt which are voidable by Statute or common law, may be set aside either by way of action or exception, and a decree setting aside the deed by exception shall have the like effect as to the party objecting to the deed as if such decree were given in a decree at his instance." A challenge by direct action may, according to circumstances, be in form of a reduction (competent only in the Court of Session), or of a petitory summons or Sheriff Court petition, with or without declaratory conclusions. Under the head of "exception" is included the case of a pursuer who challenges in replication a deed or other transaction founded on by the defender in support of his case (*Dickson*, 1866, 4 M. 797; *Mackenzie*, 1868, 6 M. 833). Where the challenge is by a direct action in the Court of Session, it may be tried with or without a jury. In the case of a circuitous preference by means of a conveyance to an interposed third party, both he and the creditor intended to be favoured should be called as parties (*Fraser*, 1889, 16 R. 740). For forms of summons or petition, reference may be made to *Juridical Styles*, vol. iii.: Lees, *Handbook of Sheriff Court Styles*, 96. The effect of decree setting aside the transaction, when obtained by an individual creditor, is to lay the subject open to the diligence or claims of creditors, according to their respective priorities or preferences (*Cook*, 1896, 4 S. L. T. 105). Where sequestration has supervened, the subject will become part of the general estate of the bankrupt, subject to any claims of preference thereon at the instance of individual creditors; and if the trustee be pursuer, he will be entitled to conclude for and obtain possession or payment of it (Bell, *Com.* ii. 216). If the creditor receiving the preference have disposed of the subject before the action, he must account for the value; but if he have acted in good faith, he may not be bound to make good more than the value he has himself received for it (*Drummond*, 1850, 12 D. 604). The subject itself cannot be vindicated

from a third party who has acquired it onerously and in good faith from the creditor (see *Drummond, supra*; *Adamson, Howie, & Co.*, 1868, 6 M. 347). Creditors challenging a preference must make *restitutio in integrum* so far as regards any benefit that may have accrued to them from the transaction sought to be set aside (Bell, *Com.* ii. 217; *Balfour*, 1822, 1 S. 466). But they are not bound to repone the preferred creditor to former rights, in relation either to estate of the bankrupt not under their control, or to third parties, which the creditor may have renounced in consideration of the alienation challenged (Bell, *Com.* ii. 217). Thus, where he has, in respect of the preference challenged, given up a bill accepted both by the bankrupt and a third party, the creditors are not bound to repone him to the position of being able to operate the bill against the third party upon the preference being set aside (*Black*, 15 Dec. 1814, F. C.).

On the subject of this article generally, see Bell, *Com.* ii. 192 *et seq.*; Goudy on *Bankruptcy*, 65 *et seq.*; Murdoch on *Bankruptcy*, 10,145; Mackay, *Manual*.

See Cessio; Insolvency; Sequestration; Trust Deed for Creditors; Composition.

Bankruptcy, Fraudulent.—See Fraudulent Bankruptcy.

Bankrupt Pursuer.—See Caution (Judicial); Title to Sue.

Banneret.—Knight-banneret, formerly the highest of the three degrees of chivalry—knights-banneret, knights, and esquires. Long and distinguished service in war, a considerable following of knights, squires, and men-at-arms, and a sufficient rent-roll to maintain the dignity, were held to be the necessary qualifications of a banneret. The dignity of knight-banneret was conferred on the field by the leader of the army, before or after a battle, with the ceremony of cutting off the point of the knight's standard, converting it thereby into a banner similar to a baron's (*Terms de la Ley, h.v.*). The knight-banneret fought under his own banner, and under the immediate command of his king (Mill, *Hist. of Chivalry*, i. 16–19, ii. 50, 51). Knights-bannerets made by the sovereign in person, under the royal standard, displayed in an army royal in open war, take social precedence of viscounts' younger sons. Knights-bannerets not made by the sovereign personally take a lower place,—after baronets, and before Knights Grand Cross of the Bath.—[*Manual of Rank*, p. 151 *et seq.*; Burke on *Precedence*; Tomlins, *Dict., h.v.*] See Banrente.

Bannock (*lit.* a cake, usually made of the meal of barley, oats, or pease) was a perquisite of the mill servant due by the thirle under the obligation of thirlage. It was one of the *sequels*, which were not mere voluntary gratuities, but were due in virtue of the astriction (*Adamson*, Mor. 15965). The amount depended on usage (*Ramsay*, 1738, Mor. 16017). See Thirlage; Sequels.

Banns and Registrar's Certificate.—*History and Nature of Banns.*—Until the passing of the Marriage Notice Act, 1878 (41 & 42 Vict.

c. 43), it was impossible to contract a regular marriage in Scotland without the previous publication of banns. That Statute introduced an alternative procedure by which, where both parties were resident in Scotland, a registrar's certificate that a notice of the intended marriage had been published in the manner therein provided, was made equivalent to a certificate that banns had been proclaimed (see *infra*). The custom of publishing banns, which had obtained in some countries from the early days of the Church, was made general throughout Western Christendom by Innocent III. at the Lateran Council of 1215 (see Pollock and Maitland, *Hist. of English Law*, ii. 368; Pothier, *Traité du Contrat de Mariage*, Partie II., chap. ii. s. 1; Friedberg, *Das Recht der Eheschliessung*, 10, 124). The Statutes of this Council were copied in the Canons of the Provincial Councils held at Perth in 1242 and 1269 (*Canons of the Church of Scotland*, published by Hailes; see Fraser, *H. & W.* i. 283). Canon 65 provides: Nullus sacerdos præsumat aliquas personas matrimonialiter conjungere, nisi prius terna denunciatione in ecclesia publice et solenniter præmissa, secundum formam concilii generalis. Since that time at least banns have been regularly proclaimed in Scotland (see *Ballantyne*, 1859, 3 Irv. at p. 361). The essential elements of banns are: (1) the public proclamation before the congregation assembled in the church, that persons, whose names and designations are stated, intend to marry each other; and (2) the granting of an opportunity to any person who knows of a valid impediment to the marriage, to state it before it is too late.

Regulations and Practice.—The form of words employed is: "There is a purpose of marriage between , residing at , in th parish and , residing at , in th parish of which proclamation is hereby made for the first (or second) time," or, if banns are proclaimed on one Sabbath only, "of which full and final proclamation is hereby made" (Cook, *Church Styles*, 44).

The regulation of the practice as to banns has been, in general, left to the Church authorities, and has been dealt with in various Acts of Assembly (see *Hutton*, 1875, 2 R. per L. P. Inglis, at p. 903. The latest regulations on the subject are embodied in Act VIII. Ass., May 28, 1880, sess. 11 (printed in Cook's *Church Styles*, 41). The chief provisions are: "Residence in a parish for the space of fifteen clear days immediately preceding shall entitle persons purposing to marry, and to whose proposed marriage there is no impediment recognised by the laws of this Church, to have the banns of marriage proclaimed in the parish church, and without such conditions no proclamation of banns shall be allowed, subject to any exceptions which may be allowed in the case of soldiers and sailors, or where one of the parties has been resident furth of Scotland. In order to due proclamation of banns between persons residing in different parishes, proclamation shall be made in the churches of both parishes." Application for proclamation of banns, giving the requisite particulars and accompanied by a certificate signed by two householders, is to be given to the session clerk.

Proclamation is to be made on two separate Sabbaths in presence of the congregation. But where the parties are well known to the minister, or he is satisfied that there is no impediment, he may, in his discretion, complete the publication in a single Sabbath. This is now a very general practice. In this case the certificate must not be granted till forty-eight hours after proclamation has taken place. It is the duty of a parish minister to celebrate a marriage on the production of a certificate that banns have been regularly proclaimed within three months immediately preceding. But he

is not bound, though he is entitled, to receive as a valid notice of marriage a registrar's certificate under the Marriage Notice (Scotland) Act, 1878 (see *infra*). The fee for proclamation of banns and certificate is not to exceed two shillings and sixpence.

The proclamation is generally read by the precentor. But in this he is merely the mouthpiece of the minister, by whom, in the eye of the law, the proclamation is truly made (*Hutton*, 1875, 2 R. at p. 902, 3 R. (H. L.) at p. 13. Where the parish of residence is a parish *quoad sacra*, proclamation is to be made in the church of the parish *quoad sacra*, and not in that of the old parish out of which it was carved (*Hutton*, 2 R. 893; affd. 3 R. (H. L.) 9). The proper course for any person who wishes to object to the marriage is to do so privately to the minister. No objection is valid, except that there exists an impediment to the lawfulness of the marriage (see MARRIAGE). A person interfering without such cause may render himself liable in damages (*Henderson*, 1855, 17 D. 348).

When Marriage is in England or Ireland.—By the Act 1661, c. 34, persons domiciled in Scotland, but married in England or Ireland, must have their banns proclaimed in the parish church of their domicile. The English Statute, 4 Geo. IV. c. 76, s. 2, which regulates the practice there, is silent as to banns in Scotland, and doubts were felt as to a clergyman in England being entitled to proceed where the banns of one of the parties had been proclaimed in Scotland. These doubts were removed by the Marriages Validity Act, 1886 (49 Vict. c 3), under which a certificate of banns in Scotland is to be received in England. It may be mentioned that, by the English Marriage Acts, proclamation of banns on three several Sundays is still essential for valid proclamation in that country (4 Geo. IV. c. 76, s. 2). See Hammick, *Marriage Law of England*, 68.

Banns of Dissenters must be proclaimed in Parish Church. — The banns of dissenters must, in Scotland, be proclaimed in the parish church, and, except in the case immediately to be referred to, of Episcopalians, no proclamation in the church which they frequent is required by law. Proclamation in Roman Catholic churches of the banns of members of the congregation is insisted on as matter of ecclesiastical order, but is not required by law. The Toleration Act of 1711 (10 Anne, c. 10), by which Episcopal ministers were allowed to solemnise marriage, provides (s. 7), that no Episcopal minister in Scotland shall "presume to marry any persons but those whose banns have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners," and that upon the pains attached to the celebrators of clandestine marriages. This section is believed to be in desuetude, as is, undoubtedly, the provision of sec. 2, which requires Episcopal clergymen to have their letters of orders recorded by the clerk of the justices of peace at quarter sessions. Both provisions were directed against the non-jurors. In practice, it is thought that in most Episcopalian churches banns are no longer proclaimed, except at the special request of the parties, and it is extremely unlikely that any prosecution for breach of the Statute would now be instituted.

Penalties for Celebration without Banns or Notice.—The proclamation of banns has been left in the hands of the Church. But various Statutes impose penalties for want of compliance with the ordinances of the Church. The Act 1661, c. 34, imposes penalties for clandestinely celebrating marriages. And by the Marriage Notice (Scotland) Act, 1878 (41 & 42 Vict. c. 43), s. 12, "any person otherwise entitled to celebrate a

marriage"—that is, since 4 & 5 Will. IV. c. 28, practically any minister of religion—"who does so without certificates of due proclamation of banns or of registrars' certificates of notice under that Act, or one certificate of each kind, as the case may be, is liable to a penalty of £50" (see *Ballantyne*, 1859, 3 Irv. 352; per L. C. Cairns in *Hatton*, 3 R. (H. L.) at p. 11). A marriage celebrated by a minister without publication of banns is a clandestine marriage, rendering the celebrator, the parties, and the witnesses liable in penalties, but it is none the less a valid marriage (Fraser, *H. & W.* i. 229). See MARRIAGE.

Effect of Banns on Wife's Deeds.—It was held in a number of old cases, and is laid down by the institutional writers, that after proclamation of the intended wife's banns in her parish church she is to be regarded as already in the curatory of the husband. Gratuitous alienations by her, whether of heritage or moveables, have been set aside as granted without his consent (*Bute*, 1666, Mor. 6031: *Fletcher*, 1611, Mor. 6029; see arg. in *Blair*, 1776, Mor. 5846, at p. 5848; Ersk. i. 6. 22; *Prin.* i. 6. 12; Bell, *Prin.* 1551: Fraser, *H. & W.* i. 681; Walton, *H. & W.* 194.

MARRIAGE NOTICE (SCOTLAND) ACT, 1878 (41 & 42 Vict. c. 43).

This Act introduced an alternative procedure. A regular marriage can now be constituted after obtaining a registrar's certificate that notice of the intended marriage has been made in the statutory manner. This certificate, "for all purposes of law," save as provided in the Act, comes in place of a certificate that banns have been duly proclaimed. But a minister of the Church of Scotland is not bound, though he is entitled, to celebrate a marriage not preceded by banns (s. 11).

Where both the parties reside in Scotland, one may proceed by banns, and the other by notice to the registrar (s. 12).

Act does not apply where one Party is Abroad.—The Statute is limited to "persons residing in Scotland" (s. 7), *i.e.* at least for fifteen clear days prior to the notice. Accordingly, where one of the parties is furth of Scotland, and will not reside there during the three weeks preceding the marriage, the Act does not apply. The Registrar-General for Scotland, in an official circular of 30th December 1878, states that, in the opinion of Crown Counsel, a registrar is not entitled to grant his certificate of publication in cases where one of the contracting parties resides in England or Ireland or elsewhere furth of Scotland. In such cases, therefore, a certificate of proclamation of banns in the case of the party residing in Scotland is still indispensable. The present Registrar-General has elsewhere stated that "there is no express rule having statutory or other legal authority as to how the case of the party resident in England or elsewhere out of Scotland ought to be treated." According to the same authority, the usual practice is for the officiating minister to ask such party (if a resident in England) to produce a certificate of publication of banns in the parish of his or her residence, or, if for any good reason this cannot be produced, to accept such evidence as he may consider sufficient that the party is in a position lawfully to contract marriage."

In this case, accordingly, the minister, where he is satisfied that there is no impediment, may be content with a certificate of the proclamation of the banns of that one of the parties who is resident in Scotland, or he may allow proclamation of the banns of the other party after less than fifteen days' residence in the parish (see *supra*, s. 1 of Act VIII. Ass., May 28, 1880, sess. 11).

Regulations as to Notice.—The notice to the registrar must state the

name, condition (*i.e.* if widower, etc.), rank, age, and residence of the parties, and contain a declaration, subject to the penalties of perjury, that the party giving the notice knows of no impediment to the marriage, and has resided within the registrar's parish or district for fifteen days preceding. Two householders in the parish or district must sign the notice, and declare that they believe the statements therein made to be true (Sched. A).

The notice is to be posted up by the registrar for seven days, during which time any person may appear personally and lodge an objection, which must be in writing, and subscribed by him. Where the objection does not set forth any legal impediment to the marriage, but relates to some formality or statutory requirement, *e.g.* that the parties have not resided for fifteen days, or are wrongly named or described, the registrar must suspend the issue of his certificate, and report to the Sheriff or Sheriff-Substitute of the county in which his office is situated.

The Sheriff may allow the notice to be amended without republication, or may order it to be cancelled if he shall see fit. In the latter case the parties may give notice *de novo* (s. 10 (*a*)).

Where the objection avers a legal impediment, the registrar must suspend the issuing of his certificate until there shall be produced to him a certified copy of a judgment of a competent court of law to the effect that the parties are not, in respect of the objection, disqualified from contracting the marriage (s. 10 (*b*)).

The wilful statement of a false objection is to be deemed perjury (s. 14). Where no objection has been made, the registrar, on the expiration of seven clear days, grants a certificate. The fees amount to two shillings and sixpence. The certificate becomes void if the marriage does not take place within three months (s. 11).

Marriage Schedule must be obtained.—Whether parties proceed by banns or by notice, or one in the one way and the other in the other, they must, before the marriage, obtain from the registrar of the parish or district *within which it is intended to be solemnised*, a copy of Schedule C to the Registration Acts (17 & 18 Vict. c. 80, s. 46, and 23 & 24 Vict. c. 85, s. 15). This must be filled up, except the signatures, by the registrar, and must be produced at the marriage, and signed thereafter by him, by the parties, and by two witnesses, and must be returned within three days to the registrar, under a penalty not exceeding ten pounds.

[Ersk. i. 6. 10 and 22; *Prin.* i. 6. 12; Bell, *Prin.* 1510, 1551; Pothier, *Traité du Contrat de Mariage*, Partie II. chap. ii.; Fraser, *H. & W.* i. 282, 681; Walton, *H. & W.* 14, 194.] See MARRIAGE.

Banrente (Baronent).—A "kinde of estaite, greater and mair honourable than Barrones; For the Barrones are permitted [1427, c. 112] to chuse their Commissioners, to be sent for them to Councell and Parliament. . . . Bot the Ban-rentes suld be warned be the Kingis speciall precept to compeir personallie" (Skene, *De verb. Sig., h.v.*; 5 Rich. II. Stat. 2, c. 4). All men "when they are belted and maid Earles, are called Barronne-Banrent, and Lorde of our Soveraine Lordis Parliament" (Skene, *ut supra*; Riddell, *Inquiry*, 572). Banrents are "equivalent, I think, to the *milites* of the early English legislation" (Innes, *Sc. Legal Antiq.*, p. 123). The word banrent is identified with banneret by Skene and Jamieson (Jamieson, *Dict.*, on Banerer and Banrente): but in England, at least, the precedence of the bannerets was next after, and not before, the barons. See BANNERET.

Bar, Personal.—Personal bar arises when one is precluded by his words or conduct from insisting, as against another, in some right which, but for such words or conduct, he would have been free to assert, even although there may have been no intention on his part to waive that right. Personal bar is not a ground of action, but a plea in defence (Esher, M. R., in *Seaton, Laing, & Co.*, 1887, 19 Q. B. D. 68).

"The doctrine is to be found in the laws of all civilised nations, that if a man either by words or conduct has intimated that he consents to an act that has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and did thereby induce others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have given faith to his words or to the fair inference to be drawn from his conduct" (L. C. Campbell in *Cairncross*, 1860, 3 Macq. 827). This doctrine has been considered in Scotland chiefly under the heads of *rei interventus*, homologation, and acquiescence, which are all forms of its application; and numerous other instances can be cited in which the plea has been sustained. But the underlying principles have not been so clearly recognised here as in England (L. Blackburn in *M'Kenzie*, 1881, 8 R. (H. L.), 16). The clearest exposition of these general principles is to be found in the analysis of the doctrine of estoppel as developed in the English Courts. And the rules there stated are of equal weight as applying to the laws of Scotland (L. Watson in *M'Kenzie, supra*, 21). "Where one by his words or conduct wilfully gives another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" (*Pickard*, 1837, 6 A. & E. 469). "Wilfully" in the above sentence means "with the intention that it should be acted on," and this intention is to be inferred from the natural meaning of the words or conduct in the estimation of a reasonable man" (Parke, B., in *Freeman*, 1848, 2 Ex. 654, at p. 661).

In the leading case of *Carr* v. *The L. & N. W. Rwy. Co.* (1875, L. R. 10 C. P. 307), Mr. Justice Brett (Esher, M. R.), after reviewing the earlier authorities, enunciated these propositions:—

I. If a man by his words or conduct wilfully endeavours to cause another to believe a certain state of things which the first knows to be false, and if the second party believes in such state of things and acts on his belief, he who knowingly made the false statement is estopped from averring afterwards that such state of things did not exist.

II. If a man, either by express terms or conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted on in a certain way, in the belief of the existence of such state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such state of facts.

III. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying the facts as represented.

IV. If in a transaction which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate

cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist. These propositions his Lordship intended to be separate and exclusive (*Seaton, Laing, & Co., ut supra*). All statements pleaded in bar must be representations of states of fact as distinguished from mere declarations of opinion or intention (*Jorden*, 1854, 5 H. L. C. 185; *Mamsell*, 1854, 4 H. L. C. 1039; followed in *Chadwick*, 1896, A. C. 231; cf. Stair, i. 10. 2). Nor is it enough to bar a defence if one has said something, supposing it to be true, and that then a stranger, having heard and acted upon it to his loss, should afterwards call upon him to make it good. There must have been reasonable expectation or intention that the party hearing would act on the statement (*Jorden, supra*; *Swan*, 1863, 2 H. & C. 175), and such intention is a question of fact for proof, or of inference.

The first of L. Esher's propositions covers the question of fraud pure and simple. "No man shall set up his own iniquity as a defence any more than as a cause of action" (L. Mansfield, quoted by L. C. Cranworth in *Jorden*, 1854, 5 H. L. C. 185). Neither can a man claim through the fraud of his agent (Bell, *Prin.* 224B, and cases); nor can creditors, through the interposition of a trustee, benefit by the fraud of a bankrupt (*Molleson*, 1873, 11 M. 510). So contracts induced by fraud are voidable at the instance of the party defrauded; and failure on the part of a creditor in a bond of caution to disclose to the cautioner material facts known to him as to the previous discreditable conduct on the part of the person for whom the bond was granted, is a fraud which will bar the creditor from suing on the bond (per L. Rutherfurd Clark in *French*, 1893, 20 R. 972; see *Young*, 1889, 17 R. 231, L. P. Inglis at 248; also per L. C. Halsbury in *Paton*, 1896, 4 S. L. T. 7, 8).

Propositions II. and III. may be considered together. They differ in this alone, that in proposition II. the intention of the party speaking or acting is express that the other party should act upon his suggestion, while under proposition III. this intention is to be inferred. Under this head fall all innocent misrepresentations inducing contracts. But the representations must be such as to induce essential error. "I know of no authority in the law of Scotland for the proposition that an innocent misrepresentation, not warranted, and not inducing essential error, can invalidate a contract" (L. Kyllachy in *Woods*, 1893, 20 R. 479). Failure also to assert one's rights under a contract, if accompanied by knowledge of actings performed in face of the obligee's rights, will bar the obligee from afterwards insisting on those rights, or claiming damages (*Steel Co. of Scotland*, 1892, 19 R. 1062). Such knowledge must be brought home to the obligee (*Cockburn, C. J., Johnson*, 1877, L. R. 3 Q. B. D. 40; cf. *Countess Dowager of Kintore*, 1886, 13 R. (H. L.) 93).

Similarly, where the drawer of a bill, which had been dishonoured two years after due, wrote to the holder asking delay, and promising payment, he was held barred from afterwards pleading informality in negotiation of the bill, the creditor having granted delay. "When a debtor holds out an obligation to pay as an inducement for delay, he cannot afterwards betake himself to technical objections" (*Allhusen*, 1870, 8 M. 600; *Shepherd*, 1870, 8 M. 619). In many cases the state of fact represented amounts to an intimation of waiver. This, of course, refers particularly to cases where nothing has been said, and the Court is left to draw its inference from the conduct of the parties. Aytoun granted a bond of cash credit to a bank in favour of a copartnery. One of the partners soon afterwards died. Within

Aytoun's knowledge, the bank continued to finance the new firm on the faith of the bond. He made no objection, and was found liable under the bond, and barred from pleading the fall of the bond with the partnership's dissolution (*Aytoun*, 1844, 6 D. 1409; *Dunmore Coal Co.*, 1811, F. C.; *Handyside*, 1868, 6 M. 753; *Graham*, 1875, 2 R. 438; *Marianski*, 1871, 9 M. 673; *Spence*, 1888, 15 R. 376). So, where parties lent money on the faith of a bond improperly executed, the borrowers were precluded from pleading the informality (*Hamilton*, 1838, 3 S. & M'L. 127; *Lang*, 1889, 16 R. 590). And where the owner of a horse which was insured intimated to the insurance company an accident to the animal, and the company at once repudiated liability, the company was barred from pleading that the insured had failed to send them a report by a veterinary surgeon, which (apart from their repudiation) was a condition precedent to claiming under the policy (*Shiells*, 1889, 16 R. 1014). A form of representation of frequent occurrence is when a deed is granted, and is delivered to a grantee for an onerous cause, and issued to the world at large. In such cases the granters may not state technical objections in questions with third parties (*Baird's Trs.*, 1883, 11 R., L. P. Inglis, 160). In the case of the *Western Bank* (1872, 11 M. 111), L. J. C. Moncreiff laid down the law in these terms: "A man is not entitled to hold himself out to shareholders as willing to fulfil the function of a director, and as undertaking their duties, and thereby giving the weight of his credit and authority to a bank, and at the same time to refrain from acting, and shelter himself under his own disqualification (to act as a director, owing to the fact that he resided outside the limit within which directors were bound by the company's rules to live)." So, where trustees and others have allowed themselves to be entered on the register of shareholders of a company, they are barred from having their names removed, even on the ground of fraud, after the company has gone into liquidation (*Smith*, 1876, 6 R. 1017; *Gordon*, 1879, 7 R. 55; *Buchan*, 1879, 6 R. (H. L.) 44; *Ker*, 1879, 6 R. (H. L.) 52; *Morgan Gold Mine*, 1891, 18 R. 772). But where the agent of trustees had caused their names to be entered as partners on the register, they were found entitled to prove that this was done without authority or subsequent ratification, and to have their names removed (*Stott*, 1879, 6 R. 1126). The grounds of bar in such cases are stated by the Lord President in the case of *Tennant*, 1879 (6 R. 554). He says: "It appears to me that the law on this subject may be stated in three propositions. In the first place, a contract induced by fraud is not void, but only voidable at the option of the party defrauded: secondly, this does not mean that the contract is void till ratified, but means that the contract is valid till rescinded: and third, the option to avoid the contract is barred where innocent third parties have, in reliance on the fraudulent contract, acquired rights which would be defeated by its rescission." "The material proposition is the third one, that when a purchaser of shares has allowed his name to be put upon a register of shareholders, and when creditors have acquired rights by contracting with the company on the strength of the register which contains his name, it is too late, after liquidation, when the creditors' rights against the company have been converted into rights against the shareholders, to rescind the contract to take shares, and withdraw from the register, on the allegation that the contract was procured by fraud" (L. Kinnear in *Mount Morgan Gold Mine*, 1891, 18 R. 782).

So, where one has signed and issued a blank cheque, he is held liable for any sum for which it may be filled up if covered by the stamp (Brett, J., in *Baxendale*, 1878, 3 Q. B. D. 525). And in a similar case, where *A.* signed a letter of credit and handed it to *B.*, and *B.* took it and got two persons to

attest as witnesses before handing it to a bank, from which he then borrowed, *A.* was held liable to the bank in terms of the credit (*National Bank*, 1892, 19 R. 886). But if the holder of a cheque, properly filled in, should alter the amount payable to a greater sum, the bank could not charge its customer for more than the sum originally filled in (*Hall*, 1826, 5 B. & C. 75).

Delay or *mora* short of the prescriptive period is alone no bar to a man's insistence in his rights (L. Ardmillan in *Robson*, 1870, 8 M. 757; L. Deas in *Mackenzie*, 1877, 5 R. 317); but where the effect of the delay is to prejudice another's position, the first party is not entitled, having stood by for an unreasonable time, to assert, as against that other, his claim (*Elliott's Trs.*, 1894, 21 R. 858; *Emslie*, 1894, 21 R. 710, L. Adam, 713). In the latter of these cases, a tenant, having paid his rent for a number of years without demur, was held barred at the end of his lease from complaining of his landlord's failure to implement his obligations during its currency. His remedy was to have retained his rent. (See *Trades House of Glasgow*, 1887, 14 R. 910; *Fraser*, 1878, 5 R. 596; and *Baird*, 1874, 2 R. 101.) So, where goods are delivered by a carrier to a consignee, he is bound to examine them within a reasonable time, otherwise his claim for short delivery or damage will be barred (*Stewart*, 1878, 5 R. 426), on the ground that the defence may be thereby prejudiced.

Negligence in itself is no bar unless it be the proximate cause of the loss, and be a breach of a duty owed to an individual, or to the public (*Young*, 1827, 4 Bing. 253; *Coles*, 1839, 10 A. & E. 437; *Orr & Baker*, 1854, 1 Macq., L. C. Cranworth, 522; Cockburn, C. J., in *Swan*, 1863, 2 H. & C. 175; *Arnold*, 1876, 1 C. P. D. 578; *Bank of Ireland*, 1855, 5 H. & C. 389; *Coventry*, 1883, 11 Q. B. D. 776; *Adair*, 1894, 22 R. 116; *Scholfield*, 1895, 1 Q. B. 536). In the case of *Wallace's Trs.* (1880, 7 R. 645), an agent had obtained trust securities by means of a forged assignation. He entered interest regularly in the trust accounts. The trustees had been negligent in their supervision of the agent, but the forgery was the proximate cause of the loss, and the trustees were held not barred from reducing the assignation. Lord Mure said: "Where a document is forged and uttered or otherwise made use of as genuine, owing to the negligence of the person whose signature is forged, the ordinary rule that a payment on a forged signature cannot be held to be a good signature does not, I conceive, apply, and cannot be pleaded to the prejudice of the person who has been induced to pay by means of the forged document" (see *Vagliano*, 1891, A. C. 107). When a person comes to know that his signature has been forged to a bill, neglect to give notice of the fraud will not bar him from repudiating liability, unless the bill-holder has been prejudiced by the silence. "It would be a most unreasonable thing to permit a man who knew that a bank were relying upon his forged signature to a bill, to lie by and not divulge the fact until he saw that the position of the bank was altered for the worse" (L. Watson in *M'Kenzie*, 1881, 8 R. (H. L.) 8; cf. *Urquhart*, 9 S. L. R. 508; and cf. *Ogilvie*, 1896, A. C. 257). As an instance of the duty whose negligent breach will operate bar, may be quoted the words of the Master of the Rolls in *Seton, Laing, & Co.* (1887, 19 Q. B. D. 68): "I protest that, if a man in the course of business volunteer to make a statement, on which it is probable that, in the course of business another will act, there is a duty towards the person to whom he makes the statement." For an exhaustive discussion of negligence in this aspect see Bevan on *Negligence*, bk. vii. ch. 4, p. 1565.

A company is not barred by the acts of its shareholders as individuals,

nor are beneficiaries as a body barred by the acts or omissions of several of their number (*Edinburgh Northern Tramways Co.*, 1891, 18 R. 1151; *Adair*, 1894, 22 R. 116).

See Admissions (by Conduct); Bill of Exchange; Fraud; Forgery; Error; Homologation; Negligence; Rei interventus; Representation; Election.

Bar of Trial, Plea in.—A plea in bar of trial must be put forward in the initial stages of criminal proceedings. The Criminal Procedure Act of 1887 provides (ss. 28, 29) that such a plea must be stated at the first diet of trial. When stated to the Sheriff at this diet, the plea may be certified by him for consideration of the High Court at the second diet (*Crawford*, 1888, 2 Wh. 8). The Court may take proof in regard to a plea in bar of trial without empanelling a jury (Hume, ii. 143; Alison, i. 659). If the plea is sustained, the trial of the accused for the offence charged cannot proceed.

The pleas usually stated in bar of trial are these: (1) *Non-age.*—If the offender is a child under seven years of age he is *doli incapax*, and so cannot be punished for crime. (2) *Insanity.*—If it is established that the accused is insane at the date of trial, the Court will order him to be confined during Royal pleasure (20 & 21 Vict. c. 71, s. 87). The question of the accused's sanity may be raised either by himself, or by the prosecutor (*Robertson*, 1891, 3 Wh. 6), or by the Court itself *ex proprio motu* (*Warrand*, 1825, Shaw, 130; *Douglas*, 1827, Shaw, 192; *Barclay*, 1833, Bell's *Notes*, 4). The onus of establishing his insanity is upon the accused, the presumption of law being in favour of his sanity. There must be proof that the accused is actually insane. It is not enough to establish that he displays eccentricity or oddity. These do not amount to legal insanity (*Bryce*, 1864, 4 Irv. 506). (3) *That the Court has no jurisdiction.*—Thus, prior to 1887, it was incompetent for a Sheriff to try a "plea of the Crown." (4) *Res judicata.*—This plea in bar of trial may take the form of an objection to trial on a libel which has already been found irrelevant. Thus it is incompetent to try a man before the Sheriff on a libel which the Sheriff-Substitute has found irrelevant (*Longmuir*, 1858, 3 Irv. 287). An accused person, however, may be brought to trial in the Court of Justiciary on a libel which has been held irrelevant by the Sheriff (*Fleming*, 1866, 5 Irv. 289). The more usual form which the plea of *res judicata* takes is that the accused has *tholed an assize*, that is, that he has already been tried on the same charge. The assize which has been tholed must have been for exactly the same crime, proved by the same evidence (*Galloway*, 1863, 4 Irv. 444; *Glen*, 1865, 5 Irv. 203). Trial, however, under one section of an Act does not debar trial under another section. If new events supervene after the first trial which change the nature of the offence, the plea of *res judicata* is invalid. Thus, a man previously tried for assault may, on the death of his victim from the effects of the assault, be tried for culpable homicide or murder (*Cobb* or *Fairweather*, 1836, 1 Swin. 136; *O'Connor*, 1882, 5 Coup. 206). If the former trial was stopped by circumstances for which the prosecutor was not responsible, such as the illness of the judge, the accused, a juror, or an essential witness, the assize will not have been tholed (Hume, ii. 469; Alison, ii. 618). The point of time at which the assize begins to be tholed is when the jury is sworn. (5) *That indemnity from prosecution has been guaranteed by the prosecutor.*—When a *socius criminis* is taken as Queen's evidence, immunity from prosecution is

guaranteed, and he cannot be tried for the offence in regard to which he depones. The promise of exoneration must have been given by the Lord Advocate personally, or by one of his deputes—the Solicitor-General or an advocate-depute. An unauthorised promise of indemnity by an inferior official is no safeguard to the person relying on the promise (*Miller & Brown*, 1850, J. Shaw, 288). To secure immunity from prosecution, the witness must give actual evidence either on precognition or at the trial.

When a plea in bar of trial is sustained, the accused, except in the case of insanity, is entitled to be assoilzied from the charge and dismissed from the bar (Macd. 431 *et seq.*; Anderson, *Crim. Law*, 233; Chisholm, *Barclay's Digest*, 544). See Criminal Trial; Res Judicata; Tholing an Assize.

Baratry.—See Barratry.

Bargain ("from O. F. *bargaigner*, to chaffer; Low Latin, *barcaniare*, to change about, shift, shuffle," Skeat) is used in Scots law as synonymous with "agreement" or "contract," and has no specialised meaning, as in England, connecting it with the law of sale. For instance, Stair writes: "Promises, when they are parts of bargains about moveables, are provable by witnesses" (I. 10. 4); and Bell, under the heading "Bargain," indexes various doctrines falling within the general law of contracts (Bell, *Com.* ii. 591). So the Act 1669, c. 9, enacts that bargains concerning moveables or sums of money which are provable by witnesses, prescribe in five years after the bargain.

Baron.—This term has now two acceptations. The first and earlier sense is that of a holder of lands which have been erected into a barony—*in liberam baroniam*. See Right of Barony; Burgh of Barony.

The baron had formerly a jurisdiction, civil and criminal, within his barony. By the Heritable Jurisdictions Act of 1747, 20 Geo. II. c. 43, this jurisdiction is abolished in all criminal causes save assaults, batteries, and smaller crimes, for which the punishment shall only be by a fine not exceeding twenty shillings sterling, or, in default of payment, one month's imprisonment; and in all civil causes, when the debt or damages shall exceed forty shillings sterling, other than the recovery of rents, duties, services, etc., from the vassals, tenants, etc., of the baron (s. 17). Jurisdiction in cases of higher value cannot be constituted by prorogation or consent of the parties litigant (s. 17). Extracts of all warrants for committal for trial before the Baron's Court must be transmitted to the Sheriff of the county every six months (s. 19).

All barons were summoned in ancient times to attend the king's Councils and Parliaments. By several enactments the lesser barons were relieved of these duties, and were appointed instead to elect commissioners to represent them. The greater barons continued to be summoned personally, and became known as the barons of Parliament, to the exclusion of the lesser barons. In time the duty of attending Parliament became divorced in fact from the tenure of a fief (the Lordship of Torphichen is said to be an exception, Riddell, *Peerage Law*, 87); and the second sense of the word arose, implying a personal dignity conferred by patent—the dignity of a lord of Parliament. Succession to this kind of barony is by blood descent, not as in the former kind, by inheritance or purchase of the feudal holding.

The mere territorial baron has no title of dignity appropriated to him. He is not necessarily even an esquire. In formal documents he is described as "——, lord of the barony of ——." He may not sign himself in these by his surname alone or by the name of his lands, but with his Christian name, or the initial letter thereof with his surname; and he may, if he pleases, adject the designation of his lands, prefixing the word OF to the said designation (1672, c. 47 (c. 21 in the "Small Acts")). The holder of a barony by patent is entitled "——, the Right Honourable the Lord ——." His signature is the title of his peerage (1672, c. 47). His degree in the peerage is next to the viscounts. (See LORDS, HOUSE OF; PEER; PRECEDENCE).

Baron and Feme.—The English law and heraldic term for *husband and wife*.—[Tomlins, *Dict.*: Boutell's *Heraldry*, 1891 ed., 113, 222.]

Baronent.—See BANRENTE.

Baronet.—Knight-baronet, a hereditary dignity lower in degree than that of baron, and taking precedence (see PRECEDENCE) after baron's younger sons. The designation of a baronet is, Sir *A. B.*, Baronet; that of his wife is, Lady *B.*, or, in formal documents, Dame *C. D.* (her maiden Christian and surnames), wife (or widow) of Sir *A. B.*, Baronet. There are four orders of baronets—the baronets of England or Ulster, 1611–1707; of Scotland, 1625–1707; of Great Britain, 1707–1808; of the United Kingdom, 1800. Precedence among the baronets goes by the dates of their individual patents of baronetcy, irrespective of the order to which they may belong. The Scottish order of baronetcy was founded in 1625 to encourage the colonisation of Nova Scotia (Royal Proc. 30 Nov. 1624, P. C. Reg.). The earlier members of the order received charters of baronies in that country as one of the conditions of their receiving the title of baronet. Where the limitation of the patent of baronetcy is to "heirs male," it is understood to mean "heirs male whatsoever" (Riddell, *Remarks*, p. 31). The members of this order are entitled to bear on an inescutcheon on their shield, or on a badge suspended from it, the arms of Nova Scotia—*arg.* a saltire *az.*, thereon, on an inescutcheon the Royal Arms of Scotland. They are entitled also to wear as a personal decoration a gold and enamel badge, consisting of the above-mentioned arms of Nova Scotia imperially crowned, within an azure garter, on which is the legend in gold, *Fax mentis honestæ gloria*. The badge is suspended round the neck by an orange-coloured silk ribbon (*Nova Scotia, Royal Letters, etc.*, Ban. Club, 1867, p. 49). On the Union of Scotland and England, the creation of baronets of Nova Scotia ceased, and a new order of baronets "of Great Britain" was instituted, which lasted till the Union with Ireland, when it was succeeded by the present order of "the United Kingdom." Baronets of these last orders bear on their shields, as an honourable augmentation, an inescutcheon *argent*, bearing a sinister hand *gules*. A baronet must have matriculated his arms before his patent is issued.

Barons of Exchequer.—The title of the judges of the Scottish Court of Exchequer; abolished in 1856, as a separate court, by 19 & 20 Vict. c. 56.

Barony.—See Right of Barony.

Barony, Burgh of.—See Burgh of Barony.

Barony, Mill of.—As thirlage arose from the necessity of proprietors recouping themselves for expenditure on mills, the existence of the obligation was readily presumed where there was community of ownership in the mill and the lands thirled (*Hopetoun*, 1753, Mor. 16029; Elch. *Multures*, 12). So strong was this presumption held to be at one time, that in *Newliston* (1629, Mor. 10852) the Court found "that naturally all the lands of any barony, without thirlage in writ, are thirled to the mill of that barony, and that thirlage is a natural servitude and inheres naturally in all the lands of that barony, so that any tenant or feuar of the lands of that barony are naturally thirled to the mill of that barony." Subsequent decisions, however, modified the strength of these findings, and the result may be stated thus. In the case of the mill of a barony and the barony lands belonging to the same proprietor, there is so strong a presumption of thirlage that astriction will be proved by payment of insucken multures for the prescriptive period (*Robertson*, 1744, 5 Bro. Supp. 740; *Hopetoun, ut supra*). Thus local situation within the barony, though it did not constitute thirlage, afforded a title for prescribing it (*Macdowal's Trs.*, 1783, Mor. 16068). The presumption, of course, disappeared as to any part of the barony which the proprietor had disponed in such a way as to divest himself of the power of astricting it (*Coltart*, 1774, 2 Pat. App. 332; *Dundas*, 1706, Mor. 35 and 15994; *Buntin*, 1682, Mor. 10872 and 15986). An Act of the Baron's Court was sufficient legal compulsitor on the possessors of the barony lands, so that repairing to the mill thereafter was not deemed voluntary on their part; and when it was followed by forty years' possession, inquiry into the regularity of the Act of Court was excluded (*Forrest*, 1671, 2 Bro. Supp. 542).

Mills, though distinct tenements and not carried as part and pertinents, are yet comprehended in a barony, which is *nomen universitatis* (*Countess of Hume*, 1667, Mor. 8895). See Thirlage.

Barratry.—1. *Of Ecclesiastics.*—Ecclesiastical barratry was the criminal offence of corrupt purchase of benefices from the See of Rome by clergymen who went abroad for that purpose. The crime was dealt with by the Acts 1427, c. 106; 1471, c. 43; 1494, c. 53, and, finally, by the Act 1567, c. 2, passed soon after the Reformation. By the last-mentioned Act the pains of barratry are declared to be proscription, banishment, and an incapacity to enjoy any honour or dignity (Hume, i. 587; Ersk. iv. 4. 30; *Acta Parl.* iii. 14; Kames, *Stat. Law Abridgt., h. t.*).

2. *Of Judges.*—Barratry, in the ordinary sense of the term, signifies the crime of exchanging justice for money. The Act 1540, c. 104, punishes with the loss of honour, fame, and dignity judges who, through wilfulness, corruption, or favour, use their authority as a cover for injustice or oppression. Theftbote, or the taking of a bribe from a thief to shelter him from justice, is a form of judicial barratry, and is punished by the Acts 1436, c. 137, and 1515, c. 2 (Ersk. iv. 4. 30).

3. *Of Mariners.*—In the law of marine insurance, barratry denotes a fraudulent act of the master or mariners, committed to the prejudice of

the owners of the ship. Policies of marine insurance contain an express stipulation that the underwriters are contented to bear losses from "barratry of the master and mariners." This form of barratry is not necessarily criminal; it may arise from mere disobedience to orders on the part of the master, as when, desiring to benefit the owners, he indulges in illegal trading, and the ship is captured and condemned (*Earle*, 8 East, 125). Mere negligence in the performance of a lawful act does not amount to barratry (*Grill*, L. R. 1 C. P. 600, 611). Nor is a mere deviation barratry (*Stamma*, Strange, 1173; *Phin*, 7 T. R. 505). Barratry can be committed only by the master or by the crew. It may be committed to the prejudice of the shipowners, or of the charterers in cases where the latter are considered *pro tempore* owners. There is no barratry if the owner is privy to the barratrous act, and so there can be no barratry where the master is owner. But a master who is only part-owner can commit barratry (*Hobbs*, 3 Camp. 93). It does not discharge underwriters of their liability to the shipowners that the freighter was privy to the barratrous act (*Boutflower*, Selwyn, N. P., 13th ed., 903). (Bell, *Prin.* s. 479; Abbott, *Merchant Shipping*, 13th ed., 185; Arnould, *Marine Insurance*, ii. 774). See Marine Insurance.

4. *In the Law of England.*—Common barratry, in the law of England, is the criminal offence of frequently inciting and stirring up suits and quarrels between Her Majesty's subjects, either at law or otherwise. A single act of inciting such suits or quarrels is not barratry. The punishment for this offence is, in the case of a common person, fine and imprisonment; if the offender belongs to the profession of the law, he is, in addition, disabled from practising for the future (Stephen, *Com.*, 12th ed., iv. 241).

Barrier Act.—See Act of Assembly.

Barter or exchange (in the Roman law, *Permutatio*), is a contract whereby property is transferred, or agreed to be transferred, from one person to another for a consideration given in some other sort of commodity —not money. Where the subjects are heritable, the contract is Excambion (*q.v.*). It was long discussed between the two schools of Roman jurists—Sabinians and Proculians—whether the contracts of barter and sale were identical. The Sabinians, with whom Gaius concurred, maintained that barter was merely a variety of sale, while the followers of Proculus, with whom Justinian agreed, and whose opinion ultimately prevailed, contended that the two contracts were essentially distinct. The distinction was material in the Roman law, since the contract of barter was constituted *re*, and no obligation, therefore, was recognised under an agreement to exchange, unless one of the commodities had been delivered (Gaius, iii. 141; Just. *Inst.* iii. 23. 2; *D.* 18. 1. 1. 1, and 19. 4. 1 pr.; *C.* 4. 64. 7 and 3). Though barter is, in modern law, like sale, consensual, the two contracts are regarded as distinct,—the leading difference being that in barter money must not be one of the things exchanged (Stair, i. 14. 1; Ersk. iii. 3. 4). It seems to be the case that Statutes referring in terms to contracts of sale (*e.g.* the Statute of Frauds, and the Stamp Act), would not apply to contracts of barter. The Factors Act, 1889 (52 & 53 Vict. c. 45), in s. 5, distinguishes, for the purposes of the section, between the two contracts. In France also the contracts are treated as distinct (Pothier, *Vente*, No. 620, and *Code Civil*, ss. 1702, 1707). The difference, however, is for most purposes not material,

since the legal effects on the rights of parties are generally, though apparently not always, the same (Ersk. iii. 3. 4; Benjamin on *Sale*, 4th ed., p. 3). The Sale of Goods Bill, 1893 (the Act is 56 & 57 Vict. c. 71), as originally framed, provided by sec. 56: (1) "Where the consideration for the transfer of the property in goods from one person to another consists of other goods, the contract is called a contract of exchange of goods; (2) Except as otherwise provided by this Act, the provisions of this Act relating to contracts of sale apply, with any necessary modifications, to contracts of exchange of goods." But this clause was struck out of the Bill by the Select Committee to whom it was referred. It has been suggested that this exclusion from the Act is of importance in Scotland, in regard to the question of risk in barter as contrasted with the rule applicable in sale; but Erskine's dictum (iii. 3. 4), before referred to, and the fact that with us the contract is completed by consent, appear to be conclusive (Brown on *Sale of Goods Act*, 1893, pp. 39 and 40).

By the Roman law, the eviction of one of the subjects exchanged, or failure in delivering either article, warranted recourse against the other commodity, the contract being treated as void (*D.* 19. 4. 13); but with us this right appears to be limited to the exchange of heritable subjects (see EXCAMBION), in which case it prevails even against the singular successors of the party with whom the exchange was made (Ersk. iii. 3. 13, and ii. 3. 28).

The contract being of comparatively rare occurrence, the law on the subject has not been fully worked out, and there is consequently an absence of authority, institutional and judicial. The cases are almost entirely English, and, from the technicality of English procedure, and the difference that formerly existed between the Scots and English law of sale, are of no great utility to Scots lawyers. The following points, however, may be noted. If one of the parties to a contract of barter fail to implement, the conclusion of any action brought against him must be *special*, for not delivering the goods according to the contract, and not for the *price*, as on a sale, unless there be a subsequent agreement to pay in money (*Harrison*, 1845, 13 M. & W. 139; Park, B., at p. 141; *Read*, 1813, 3 Camp. 351). If the contract is to pay for goods partly in goods and partly in money, the claim of the vendor, again, must be laid on the special contract (*Talver*, 1816, Holt, N. P. C. 178; *Read*, *ut supra*). But where the goods are actually delivered in part performance of the contract, the money portion of the consideration might be recovered on a claim as for goods sold and delivered (*Sheldon*, 1824, 3 B. & C. 420; *Bull*, 1842, 12 L. J. Q. B. 93). In Scotland the action would take the form of a demand for specific implement or damages.

A mercantile factor or agent has no power at common law, without special authority, to barter. Accordingly, in *Guerreiro* (1820, 3 B. & Ald. 616), where a factor had bartered his principal's goods, it was held that no property had passed, and that the principal might maintain an action of trover against the other party, although the latter was wholly ignorant that he had been dealing with a factor only (see the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 1 (1), 2 and 5, applied to Scotland by 53 & 54 Vict. c. 40).

[Benjamin on *Sale*, 4th ed., 1, 3; Blackburn on *Sale*, 2nd ed., 163; Chitty on *Contracts*, 12th ed., 430, 487, 488, 493, 494; Chalmers on *Sale of Goods Act*, 1893, 4 and 5; *Code Civil*, ss. 1702, 1707.] See EXCAMBION; SALE.

Base and Public Rights.—When a proprietor is infeft in lands in virtue of a *de me* holding, his right to them is called base; and

when he is infeft in lands in virtue of an *a me* holding, his right is called public. It seems that rights to land came to be termed public, in the case of an *a me* holding, because the title was originally completed in presence of the *pares curiæ*; and that rights to land were termed base, in the case of a *de me* holding, because the proprietor under them was further removed, in a feudal sense, from the lord paramount than was the person from whom his right flowed. For this reason base rights were also called subaltern rights. They were also termed private, because it was at one time not uncommon to make a grant of lands with a *de me* holding, and, prior to the institution of our system of registration, to keep them latent (*Duff*, 147). There is this important distinction between a public right and a base right, that no new fee is created by a conveyance with an express or implied holding *a me*, the grantee under it taking his granter's place; whereas a base right creates a new fee, and constitutes the relation of superior and vassal between the granter and the grantee, leaving the granter to hold of his own superior, and making the grantee hold of the granter as his immediate superior.

In connection with base and public rights, it is proper to notice that, whilst it was lawful for a vassal to grant sub-feus when he was not prohibited from doing so by a condition against sub-infeudation, he could not, at an early period, substitute a stranger in his place without the consent of the superior (Ersk. ii. 3. 13; ii. 7. 5.). Thus A., a vassal of B., while he might grant a feu-charter of the lands held by him to C., and thereby create an estate of superiority in them in his own favour, and give an estate of property in them to C., could not, without B.'s consent, convey the lands by disposition to C. so as to substitute C. in his place, and thereby bring to an end the relationship of superior and vassal which subsisted between him and B. This rule was first modified and then abolished. By an Act of Alexander I., Sheriffs were empowered to sell a debtor's lands on fifteen days' notice, when his moveables were insufficient to pay his debts, and the purchaser of the lands was entitled to hold them of the debtor's superior (Bell, *Lect.* i. 571). This Act having fallen into abeyance, it was successively enacted that creditors-apprisers (1469, c. 36), adjudgers (1672, c. 19), and purchasers of bankrupts' lands at judicial sales (1681, c. 17) should be entitled to entry with superiors on payment of a year's rent of the lands. After the passing of the Acts 1469, c. 36, and 1672, c. 19, which entitled creditors-apprisers and adjudgers to enforce entry with superiors, purchasers were in the habit of going through the form of apprising or adjudging the sellers' lands, and thereafter, as creditors-apprisers or adjudgers, demanding entry from the superiors thereof (Bell, *Lect.* i. 572). Even before the passing of the Acts 1672, c. 19, and 1681, c. 70, "the Crown, under a sense of the unsuitableness of the feudal fetters to the exigencies of advancing freedom and commerce, had adopted a liberal course towards its vassals, having laid down the rule, as appears from 1578, c. 66, to grant confirmation upon payment of expenses by the party" (Menzies, 610). Another Statute (1685, c. 22), which first legalised entails, made it lawful "to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies." The Act, however, declared that nothing in it should prejudice a superior's right to his casualties of superiority. The state of the law against alienation, as opposed to sub-infeudation, led also at an early period to another device, by which the effect of it in practice was modified. A vassal whose desire was to substitute his disponee in his place, and not to create a permanent relationship of superior and vassal between himself and his disponee, granted two charters or conveyances to

his disponee, the one with an obligation to infeft *a me*, and the other with an obligation to infeft *de me*. On these two deeds an instrument of sasine was expede, which, by its terms, could be held to proceed on either. In virtue of the *de me* holding, the instrument of sasine, when recorded in the appropriate register of sasines, gave the disponee a valid title but a base right to the *dominium utile*, with the seller as his immediate superior. As soon as the superior of the vassal who had sold his lands recognised the disponee as a vassal, *i.e.* confirmed his infeftment, the infeftment was ascribed to the *a me* holding, the deed with the *de me* holding was from the progress of titles, the disponee took his disponer's place as a vassal, and the infeftment became public instead of base. In other words, the infeftment, until recognised by the disponer's superior, gave a valid title to the property, leaving a mid-superiority in the disponer, and when recognised, extinguished the mid-superiority in the disponer, and invested the disponee with it. In this way the disponee was substituted in his disponer's place, and the relationship of superior and vassal between the disponer and the disponee ended (Bell, *Lect.* i. 684; Menzies, 638). Later, a vassal gave to his disponee, instead of two deeds, a disposition containing an obligation to infeft *a me de superiore meo vel de me*, or, as it came to be put, *a me vel de me*. Infeftment on such a deed secured to the disponee a feudal title to the property, and created a mid-superiority in favour of the disponer; and, on the disponee's recognition by the superior, the seller was divested of the mid-superiority, and the disponee infeft in it (Bell, *Lect.* i. 684; Menzies, 638; Ersk. ii. 7. 16).

As will be shown when the DISPOSITION (*q.v.*) is under consideration, a superior entered or recognised his vassal's disponee by granting a writ by progress. The writ by progress, down to the passing of the Titles to Land Act, 1858 (21 & 22 Vict. c. 76), was a charter of confirmation, or a charter of resignation, or, in certain circumstances, a combined charter of resignation and confirmation, and thereafter, till the commencement of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), a charter or writ of confirmation, or a charter or writ of resignation. The circumstances in which the charter or writ of confirmation, and the charter or writ of resignation, and the combined charter of resignation and confirmation, were used, will be pointed out in dealing with the subject of the disposition. But it may be well to notice here, that although entry granted to the disponee of a vassal by confirmation or resignation was common in practice prior to 1747, a disponee, as such, was not entitled to force an entry with the superior until that year, when a Statute (20 Geo. II. c. 50) was passed which provided that any person purchasing or acquiring lands from the former proprietor or vassal, who was duly vested and seized therein, and obtaining from such vendor or former proprietor a disposition or conveyance, containing a procuratory of resignation, should be entitled to charge the superior in the lands to grant him new infeftment (ss. 12, 13). The Statute, it will be observed, gave a purchaser with a disposition containing procuratory of resignation, right to compel an entry by resignation only. But by the Lands Transference Act, 1847 (10 & 11 Vict. c. 48), superiors could be compelled to grant entry by confirmation, sec. 6 of the Act providing that where any person should be infeft in lands or heritages in Scotland holden of a subject-superior on a disposition containing an obligation to infeft *a me* or *a me vel de me*, and granted by the person last entered and infeft, or granted by a person whose own title was capable of being made public by confirmation according to the law and practice then existing, it should be competent to charge the superior to grant in favour of such person an

entry by confirmation. Entry by resignation or by confirmation, since the commencement of the Conveyancing Act, 1874, has been abolished. By sec. 4 (1) of the Act of 1874, it is provided that, when lands have been feued, whether before or after the commencement of the Act, "it shall not, notwithstanding any provision, declaration, or condition to the contrary in any Statute in force at the passing of this Act, or in any deed, instrument, or writing, whether dated before or after the passing of this Act, be necessary, in order to the completion of the title of any person having a right to the lands, in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress; and it shall not be competent for the superior in any case to grant any such charter, precept, or other writ by progress: Provided always that nothing in this Act contained shall prevent the granting of charters of novodamus, or precepts, or writs from Chancery, or of *clare constat*, or writs of acknowledgment." As soon as a disponee takes infeftment, he is, in accordance with another provision of the Act (s. 4 (2)), held, as at the date of the registration of his infeftment in the appropriate register of sasines, to be duly entered with the nearest superior, whose estate of superiority in such lands would, according to the law prior to the Act, have been not defeasible at the will of the proprietor so infeft, and that whether the superior's own title, or that of any over-superior, has been completed or not. A holding *de me* is still appropriate to, and is inserted in, an original feu-right, *i.e.* a feu-charter, feu-disposition, or feu-contract. But since the passing of the Conveyancing Act, 1874, the expression of a holding in a disposition is unnecessary. If any holding is expressed, it should be *a me*.

On base and public rights, see Stair, ii. 3. 27; Ersk. ii. 3. 13 and 20, ii. 7. 5 *et seq.*; Duff, 146; Menzies, 614, 637; Bell, *Lect.* i. 688 *et seq.*; Bell, *Prin.* s. 785, 818, 844.

Bastard.—A bastard is a person born out of lawful wedlock. The law of Scotland, following the rules of the civil and canon law, legitimises the bastard whose parents subsequently marry: subject, however, to this exception, that if at the time of the conception there was a legal impediment which stood in the way of the parents' marriage, the subsequent marriage of the parents, on the removal of the impediment, does not legitimise the ante-nuptial offspring. It was suggested in the case of *M'Robert* (1836, 14 S. 1104), that when a child has been born out of wedlock, the intermediate marriage of either of its parents with another than the parent of the child does not bar the legitimation of the child by the subsequent marriage of the parents. Where a child is born during marriage, the maxim *pater est quem nuptiæ demonstrant* applies, but that is merely a presumption, which may be overcome by proof, to the effect that the child could not be the child of the marriage, in respect of non-access by the husband, or otherwise. If, however, the husband had access, and at the same time the wife was carrying on a criminal intercourse with others, a child born under such circumstances is legitimate. The relations between a father and his bastard child is not in any proper civil or municipal sense the relation of parent and child. But it is hardly correct to say, as has been said by many eminent judges in Scotland, that a bastard is *filius nullius*. In the most recent case in which this subject was discussed in the House of Lords (*Clarke*, 1891, 18 R. (H. L.) 63), L. Watson said: "There are two expressions upon which I desire to remark, which have been frequently

used by Scotch judges in bastardy cases and by text-writers, one of which appears to me to have been sometimes employed in a way calculated to mislead. It has often been laid down that a bastard is *filius nullius*. Of that expression it is sufficient to say that it is as true in a legal as it is untrue in a natural sense. Again, it has been said that a bastard has a mother, but no father. The phrase is unobjectionable so long as it is only meant to express the obvious fact that the maternity of a bastard is, comparatively speaking, a matter of certainty, whereas its paternity may be matter of doubt, and in some cases the father may never be identified. It becomes, in my opinion, mischievous when it is used to convey the suggestion that after the father has been ascertained by admission, or by judicial proof, the tie which connects him with the child is more slender and less enduring than that which binds the child to its mother. There is no principle of natural law which can justify such a distinction, and beyond a few loose *dicta*, I can find no authority for it in the law of Scotland."

Domicile.—A bastard follows the domicile of his mother, and in a question of settlement under the Poor Law Act, 1845, on attaining of puberty, takes his mother's settlement, and not the settlement of his own birth (*Wallace*, 1894, 22 R. 43).

Aliment.—The parents of a bastard are jointly liable to aliment their child until it is able to support itself (Ersk. i. 6. 56; *Clarke, ut supra*). In the event of neither the father nor the mother being able to support the child, the parish of the mother's settlement is liable for its support. The period during which the mother is entitled to claim aliment from the father depends on the circumstances of each individual case. As was said by L. P. Inglis: "The general rule in such cases is that the father of an illegitimate child has to contribute one half to its support till it is the age of seven, and in some cases till the further age of ten. The reason for that rule is that during these years it is proper that the child should be left with its mother, and that it is not able to do anything for its own support. After that age a great deal depends upon the condition of parties; and if the mother chooses to go on keeping the child, without asking for more money or insisting upon the father taking the child, then, if she thinks fit to bring an action for aliment of the child at the end of two or three years, she may be held debarred by her conduct from making any such demand. On the other hand, if the father of the child desires to have the custody and charge of the child, then is the time for him to offer to take it; and if the mother does not offer to keep it, the father will have to support it until it is fourteen, or until it is able to do for itself" (*Dunnet*, 1883, 11 R. 280). The rate of aliment also varies in different parts of Scotland, but the usual amount awarded is £8 per annum. By sec. 80 of the Poor Law Act, 1845 (8 & 9 Vict. c. 83), every mother and every putative father of an illegitimate child, after the paternity has been admitted or otherwise established, who shall refuse or neglect to maintain such child, being able to do so, whereby such child shall become chargeable to any parish or combination, shall, upon conviction, be punishable by fine or imprisonment with or without hard labour. A bastard is under no legal obligation to aliment his parents (*Clarke, ut supra*). See ALIMENT.

Custody.—The mother is entitled to the custody of her bastard child. The father has no right of custody of the bastard's person or of administration of his estate; he has none of the characteristics of the *patria postestas* (per L. J. C. Inglis in *Corrie*, 1860, 22 D. 900). He cannot appoint a guardian to his bastard child, but he is entitled to claim the custody of the child in the event of the mother demanding aliment after the particular

period fixed by the Court has expired. "It is clear that during the infancy of a child the mother is entitled to the custody of it; but after the age of seven if a boy, and of ten if a girl, if no delicacy is alleged to exist, the father, on aliment being demanded, is entitled to meet that demand by an offer to take the child into his own house, or to make other arrangements for its aliment" (per L. Cowan in *Corrie, ut supra*). See CUSTODY OF CHILDREN.

Succession, etc.—As a bastard has no father recognised in law, there can be no succession to or from him, except in the case of his having lawful issue. Prior to 1836 a bastard without lawful issue could not dispose of his moveable estate by testament, but by the Act, 6 Will. IV. c. 22, he is placed in the same position in this matter as a legitimate child. If a bastard die intestate without having lawful issue, the Crown succeeds as *ultimus hæres*, but the Crown may, by what is called a GIFT OF BASTARDY (*q.v.*), make over to the person who would have succeeded had the bastard been legitimate, the bastard's means and estate. A bastard has no right of *legitim*, nor has he a claim against his mother's moveable estate under the Married Women's Property (Scotland) Act, 1881. In taking under the testament of his father or mother, a bastard has to pay the same duty as a stranger. On the other hand, a bastard's parents have no patrimonial rights from their relationship to him; and it was held by the House of Lords, in *Clarke, ut supra*, that a mother could not recover damages for the death of her bastard son.

The widow of a bastard is entitled to all the legal rights of a widow, including terce and *jus relictæ*. See SUCCESSION.

Bastardy, Declarator of.—See LAST HEIR.

Bastardy, Gift of.—See GIFT OF BASTARDY.

Baths, Wash-houses, and Drying-grounds.—Power to provide these conveniences for public use has been granted by Statute to local authorities, both in burghal and rural districts. The enactments thereanent are here summarised:—

1. *In Burghs.*—By the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), the Commissioners of any burgh are empowered to provide public baths, wash-houses, covered or open bathing-places, and drying-grounds, and to make a charge for the use thereof (ss. 309–314). The Commissioners, in exercising this power, must proceed by Special Order, as prescribed in the Act (s. 306) (which gives the ratepayers, in certain circumstances, power to veto the resolution of the Commissioners). They may make bye-laws for the due regulation of the baths, etc. (s. 316, subs. 3), which must be approved by the Local Government Board (Schedule IV. subs. 3); a printed copy or abstract thereof must be exhibited (s. 313); the property of any person refusing to pay the prescribed charges may be detained (s. 312). And the Commissioners may, if they think fit, discontinue the baths or wash-houses, proceeding, as before, by Special Order (s. 314).

With regard to a supply of water for such establishments, the Act makes the following provisions:—(*a*) Where a burgh is not supplied with water under authority of an Act of Parliament, the duty is imposed on the Commissioners of maintaining and supplying public wells and other water-works for the gratuitous use of the inhabitants; and they are

empowered to supply with water any public baths or wash-houses (s. 257). (*b*) Where the Commissioners have provided, under the powers contained in sec. 261, water for the domestic and ordinary use of the inhabitants, they may, if they have more than is required for such purposes, supply public baths and wash-houses with water, at an agreed-on rate; failing agreement, the rate is to be fixed by the Sheriff (s. 264).

2. *In Counties.*—The Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58), s. 44, provides that one or more Parish Councils, or ten electors of any landward parish, or of the landward part of any parish partly landward and partly burghal, may call upon the District Committee of the County Council to form a special district for the provision of public baths, bathing-places, wash-houses, or drying-grounds, and for that purpose to adopt secs. 309–14 of the Burgh Police Act, 1892. The District Committee, if they approve of the proposal, shall define the boundaries of the special district, and specify which of the said provisions are to be adopted (subs. 2). Where the proposed special district embraces any part of a special drainage or water-supply district, the consent of the County Council must be obtained (subs. 3). The expense of forming and maintaining such a district shall be defrayed by a rate to be levied by the County Council along with the public health rate, but not exceeding 9d. in the £, and the County Council may borrow on the security of such rate (subs. 6). The District Committee may annually appoint a sub-committee, consisting of parish councillors within the special district, for carrying out the purposes for which it has been formed (subs. 8).

The provisions of sec. 89 of the Public Health (Scotland) Act, 1867, dealing with water-supply, which apply alike to counties, and burghs with a population under 10,000, or not having a local Act for police purposes, are similar to those of the Burgh Police Act above noticed. It may be remarked that the power of a local authority, under the Public Health Act, to supply water gratuitously to public baths, is limited to such as are not established for private profit or supported out of any burgh rates. The restriction, however, is unimportant, in view of the power given by the Burgh Police Act.

Baton.—(1) A short staff, used as a symbol of office. Each baton is distinctive of the office to which it belongs. (2) In the old ceremony of resignation by a vassal of his feudal holding, the transference of a baton was the act symbolising delivery. In the later practice a pen represented the baton.—[Menzies, *Conveyancing*, 567, 568.] See Resignation; Delivery, Symbols of.

Battery pendente lite.—The law of England distinguishes between assault and battery. The former may be committed by a mere touch or by a threat; in the latter, the attack must be violent or rude (*Rawlings*, 3 M. & W. 28). No such distinction exists in the law of Scotland; the *nomen juris* "assault" is applied to every criminal attack on the person, of whatever degree of violence it may be. The institutional writers, however, have employed the term "battery" in reference to an assault committed during the dependence of a lawsuit by one of the parties to the action upon the person of the other party. The offence of battery *pendente lite* was first dealt with by a temporary Act of the year 1555. The Act 1584, c. 138, is the next Statute which deals with the crime, and the punish-

ment it imposes is that the guilty party shall lose the cause. The dependence of the suit, during which time battery in the sense of the Statute might be committed, endured for the period between the raising of the summons and the complete execution of the decree to be given thereon. The Statute was to remain in force for seven years. The provisions of the Act of 1584 were practically re-enacted by 1594, c. 223, which were declared to be perpetual. The sentence pronounced against the assailant was declared by the Statutes to be unreducible either on the head of minority or on any other ground. If the accused did not appear for trial, and was in consequence denounced rebel, it was provided that his liferent, as well as single escheat, should be forfeited immediately after such denunciation. If the accused became bankrupt, the penal consequences of the action affected his creditors (*Annand*, 1790, Mor. 1379).

The Act of 1594, c. 223, was repealed by 7 Geo. IV. c 19, and the offence of battery *pendente lite* is now obsolete.—[Ersk. *Inst.* iv. 4. 37; Kames, *Stat. Law Abridg., h.t.*]

Bearer Bonds.—*Nature of.*—It is a common practice with companies, English or foreign, and with foreign Governments, to borrow money by issuing bonds containing an obligation to pay to the bearer. In certain cases, especially when they are issued in reference to a trust deed for debenture holders, the obligation contained is to pay to a party named as trustee, or to the bearer (*Venables, C.*, 1892, A. C. 201). They are usually issued with coupons attached for the interest payable on the bond. The actual form of the bond varies greatly. Thus it may be conceived as a simple obligation to pay the principal and interest, or, in the case of perpetual debentures, merely the interest, to the bearer; or it may contain, in addition to such an obligation, an assignation of the assets of the company in security of the amount due. Such bonds are sometimes issued with a provision whereby the bearer may, on application, and on production of his bond and all outstanding coupons, be registered as the holder of an ordinary debenture. The use of bearer bonds is greatly restricted by the *ad valorem* duty of 1s. for every £10 which is imposed upon them by the Stamp Act, 1891 (54 & 55 Vict. c. 39, Sched., *s.v.* "Marketable Security").

May be Promissory Notes.—Bearer bonds may be conceived as a simple promise to pay to the bearer, in which case they are promissory notes (Bills of Exchange Act, 1882, s. 83; *re Imperial Land Co.*, 1870, L. R. 11, Eq. 478), and [subject to the qualifications that they must be duly stamped, and that the company issuing must be one which has the power to issue promissory notes (see *Bateman*, 1866, L. R. 1 C. P. 499)], their nature and effect are governed by the rules contained in the Bills of Exchange Act, 1882. There is then no question that they form negotiable securities. The mere fact that a bond contains an assignation in security does not take it out of the category of a promissory note (Bills of Exchange Act, 1882, s. 83, subs. 3), but such note must contain an unconditional promise to pay, and as bearer bonds in most cases refer to conditions of issue and of payment, their validity and effect must then be decided apart from the law of promissory notes (*Crouch*, 1873, L. R. 8, Q. B. 374).

Bearer Bonds not in form of Promissory Notes.—In cases where the bonds do not fall within the definition of promissory notes, questions may arise (1) as to their validity as a form of obligation: and (2) as to their negotiability. The former question must be decided by the law of the place of issue (Dickson on *Evidence*, s. 997; Gillespie's Bar's *Private International*

Law, pp. 286, 287, Note E; *Dale*, 1829, 7 S. 369), the latter by the law of the place in which they are transferred (*Picker*, 1887, 18 Q. B. D. 515, per L. Esher, p. 518).

Question as to their Validity if issued in Scotland.—If a bond payable to bearer is issued by a company having its head office in Scotland, and in a form which takes it out of the category of a promissory note, it is believed, though the point has never arisen, that it would be invalid as a blank bond under the provisions of the Act 1696, c. 25, "anent blank bonds and trusts." The effect of that Act, as interpreted, is that the validity of a bond depends upon the name of the creditor being mentioned, or sufficient information being given as to his identity (Ersk. iii. 2. 6; *Walkingshaw Evers.*, 1730, Mor. 1684). (See BLANK BONDS.) The "notes of any trading company" are, however, exempted from the operation of the Act, and it is possible that bearer bonds might be held to be included in that description. But in the present state of the law it would be dangerous to rely on the validity of a bearer bond issued in Scotland, unless it was issued under the provisions of some particular Statute. There is no provision in the Companies Acts authorising the issue of such bonds (cf. Buckley, *Companies Acts*, 6th ed., p. 163), nor is there any general provision in the Companies Clauses or Railway Clauses Acts to entitle a company incorporated by private Act of Parliament to issue such securities. But such a power might be granted by a particular private Act. Such a power has frequently been given to local authorities, and the provisions usual in such Acts have been summarised by the Local Authorities Loans Act, 1891 (54 & 55 Vict. c. 54). By that Act, any local authority (defined by s. 4), which has issued stock, may, on the request of the stockholder, issue to him a stock certificate to bearer, that is, a certificate entitling the bearer to the stock therein specified, with coupons attached entitling him to the dividend on the stock. Such a certificate is declared to pass by delivery, and to entitle the holder for the time being, on delivering to the registrar the certificate and all outstanding coupons, to have the stock registered as ordinary stock in his name (s. 41, Sched. K).

Negotiability of Bearer Bonds.—The law as to the negotiability of bearer bonds is not yet thoroughly settled. There is no direct decision in Scotland on the point, nor does the Local Authorities Loans Act, 1891 expressly state that bearer certificates issued under its provisions are negotiable to the extent of giving a party who has taken them in good faith a good title to them, even if the title of his author was defective. But in one case it was held that such bonds were subject to banker's lien, which only extends to negotiable securities (*Robertson's Tr.*, 1890, 18 R. 12—City of Edinburgh bonds), and in another case their negotiability was assumed (*National Bank*, 1895, 22 R. 740). In England it would seem to be settled beyond question that bonds payable to bearer, issued by foreign governments, or by foreign companies, and proved to pass from hand to hand by simple delivery in the Stock Exchange, are negotiable instruments for all purposes, in the same way that a bill of exchange is (*Gorgier*, 1824, 3 B. & C. 45—foreign government bonds: *Goodwin*, 1875, L. R. 10 Ex. 337, and 1 A. C. 476; *Rumball*, 1877, 2 Q. B. D. 194—scrip certificates to bearer; *London Joint Stock Bank* [1892], A. C. 201—Argentine cedulas; *Venables* [1892], 3 Ch. 527—American railroad bonds). The practical effect in the more recent of these decisions has been that where securities of this sort are pledged with a banker, he acquires a good title to them, provided that he has not actual notice that his customer had no authority to pledge them (*London Joint-Stock Bank*, and *Venables, supra*; *Bentinck* [1893], 2 Ch. 120). But the recognition of bearer

bonds, or debentures payable to bearer, issued by a company registered at home, has been more difficult, chiefly, however, on the ground, which is not applicable to Scotland, that such bonds are covenants under seal, and cannot, therefore, unless they are promissory notes, be negotiable instruments. On this ground their negotiability was negatived, in spite of proof of a custom of trade to treat them as negotiable (*Crouch*, 1873, L. R. 8 Q. B. 374); but this case has been doubted (*Goodwin*, 1875, L. R. 10 Ex. 337, and 1 App. Ca. 476). And a recent writer on the subject has ascertained that it is the custom of most London bankers to treat such instruments as negotiable (Palmer, *Company Precedents*, 6th ed., i. p. 620; Smith's *Leading Cases*, 10th ed.; Notes to *Miller* v. *Race*).

Beating and Defaming Judges.—1. *Beating and Insulting Judges.*—(*a*) *Statutory Offences.*—The Act 1593, c. 177, provides that whosoever should strike or hurt any judge, sitting in judgment, should incur the penalty of death, and be accused criminally therefor. This same Statute, it may be noted, provides further, that if any person strikes, hurts, or slays another within the inner Tolbooth, while the Lords of Session are sitting for the administration of justice, he shall incur the pain of treason; if anyone strikes or hurts another before the Lord Justice or his deputes, or within the outer Tolbooth, while the Lords of Session are sitting for the administration of justice, he shall incur the pain of death; and if any person strikes or hurts another before any inferior judge, while sitting in judgment, he shall be punished by fine and imprisonment.

The Act 1600, c. 4, makes it a capital offence to invade or pursue any of "His Highness's Session," it being doubtful, however, whether this phrase refers to the Lords of Session or of the Privy Council (Hume, i. 405, note). The Act 7 Anne, c. 21, which assimilated the treason law of Scotland to that of England, makes it treason to kill any of the Lords of Session or Justiciary while sitting in judgment.

(*b*) *Common Law Offences.*—Minor insults or threats offered to a judge in his judicial capacity, whether he is sitting in Court or not, may be dealt with at common law, and punished by an arbitrary sentence.

2. *Defaming Judges.*—To slander or "murmur" a judge is made an offence by the Act 1540, c. 104. Such an offence is punishable by fine and imprisonment (*Porteous*, 1832, 4 S. J. 384 (in which it was held that 1540, c. 104, is not in desuetude); *Carr*, 1854, 1 Irv. 464; *Robertson*, 1870, 42 S. J. 356). The judge against whom the offence has been committed may summarily convict and punish the offender.—[Hume, i. 406; Alison, i. 575; Ersk. iv. 4. 32.]

Bees.—Bees are private property only when in a hive or skep, or when working in the hollow of a tree or wall. When bees hive, "if the identity can clearly be made out, and the claim made without delay, the owner ought to have the property in preference to another on whose premises they may have alighted" (Barclay's *Digest*, *h.t.*).—[Ersk. ii. 1. s. 10; Stair, ii. 1. s. 33; Hume, i. 82. See 3 Scots Law Times, p. 259. Cf. Mackenzie, *Rom. Law*, ch. 3.] See Animals (Property in Wild).

Before Answer.—As a general rule, proof in a case should not be allowed until the relevancy of the averments as grounds of action or

defence has either been admitted or established by argument. *Frustra probatur quod probatum non relevat.* The rule is applied universally in criminal proceedings, where all objections to the relevancy of the libel are disposed of before the case goes before the jury. In certain forms of civil process, *e.g.* in undefended actions of divorce and in actions of division, an interlocutor expressly sustaining the relevancy is pronounced before proof is allowed: but in general, if either party permits an unqualified order for proof to be taken, that amounts to an implied admission of the relevancy of his opponent's averments, and no interlocutor sustaining the relevancy is necessary. Accordingly, although questions of law may be argued after the proof, the party against whom such an unqualified order has been taken cannot thereafter maintain that no proof should have been allowed, or that the facts proved should be disregarded.

Proof before Answer as to Relevancy.—An averment is, strictly speaking, either relevant or irrelevant to support a proposition in law, and it is accordingly theoretically possible to determine in every case whether the averments, assuming them to be true, afford a good ground of action or defence. Wherever the averments raise a sharp question of law, which, if decided, will dispose of the case one way or other, it is the duty of the Court to pronounce a decision on the law, without ordering investigation (see the observations of the House of Lords in *Paton*, 1896, 4 S. L. T. 6; and *Assets Co.*, 1896, 4 S. L. T. 13). But it is frequently found in practice to be unsatisfactory to decide cases upon relevancy alone. "When a question of relevancy is raised, and judgment asked upon it before the facts are ascertained, it requires the exercise of the sound discretion of the judge whether he shall comply with that demand, or whether he shall have the disputed matters of fact investigated in some proper manner before answer" (L. Curriehill in *Millar*, 1856, 18 D. 402). It is in many cases felt to be inexpedient to determine questions of law affecting, it may be, large interests, upon hypothetical and unascertained facts: and moreover, questions of relevancy are often extremely narrow and technical, depending more upon the manner in which the pleadings happen to be expressed, than upon the real state of the facts between the parties. Frequently, too, the pleadings may raise a very difficult question of law, while the facts, if ascertained by a short investigation, may negative the averments upon which the legal question arises, and thus save the necessity for a decision; or it may be that part of the case is clearly relevant, while the relevancy of the remainder is doubtful, and it is considered undesirable to break it up by ordering proof only of a portion. In such and similar cases, it is the habit of the Court to allow a proof before answer, *i.e.* before answer as to the relevancy. The effect of this limitation is that "all questions of law or relevancy raised upon the record are reserved entire" (L. P. Inglis in *Robertson*, 1867, 6 M. 114). Accordingly, even although the facts averred are fully proved, they may yet be found insufficient to support the conclusions of the action or the pleas in defence. The use of the expression "before answer" in this sense, *i.e.* before answer as to the relevancy, has been familiar to the law of Scotland for over two hundred years (L. P. Inglis in *Robertson*, *supra*), and it is the sense in which it is usually employed. It is equivalent to the English demurrer. Some judges in recent times, however, have proceeded on the view that as questions of law (so far, at all events, as not purely preliminary) can always be argued after the proof, all proofs are really before answer, and that if a judge, even after a proof has been taken, comes to be of opinion that no relevant case has been stated, it would be unreasonable to compel him to pronounce a judgment which he

believed to be wrong, simply because he had not been asked at an earlier stage of the case to apply his mind to the relevancy, or to reserve it expressly. This view was, however, disapproved of by the First Division in *Simpson*, 1875, 2 R. 673. For a discussion of the history of the expression "before answer," which derives its origin from the procedure under the canon law, see Mackay, *Practice*, ii. 15–18.

Proof before Answer as to Competency.—Where the plea is stated that the averments of either party can only be proved by writing, or by writ or oath, it is in general improper to allow a proof at large before answer for the purpose of reserving the question until the facts are ascertained (*Thomson*, 1868, 7 M. 39). In cases, however, where it depends upon the precise nature of the facts whether the plea is well founded or not, a well-established custom has sanctioned the allowance of proof subject to the reservation. Thus, for example, where a pursuer alleged a verbal contract or agreement of employment for three years as agent for a manufacturing firm, and it was not clear upon the averments whether the contract was one of agency (provable by parole) or of service (provable only by writ or oath), the Court allowed a proof at large before answer as to the facts, leaving the competency of the parole evidence to be determined after the circumstances were ascertained (*Pickin*, 1878, 5 R. 676). Similarly, in cases where proof is competent only by writing, and a writing is produced which is inconclusive in its terms, proof before answer of the whole case may be allowed before it is decided whether the writing founded on is sufficient. Where a party makes averments, some of which may be proved by parole, while others are provable only by writ or oath, a proof before answer may be allowed (*Stuart*, 1869, 7 M. 366), unless the two parts of the case are clearly separable (*Royal Bank*, 1877, 15 S. L. R. 13), when the interlocutor should distinguish the modes of proof applicable to each.

Proof before Answer in Remits.—Practice has also sanctioned the reservation in cases where it is considered expedient to have the facts investigated and reported on by a man of skill before decision, either at the desire of the judge for the purpose of informing his own mind, or on the motion of either party, without consent of the other. But if this method of procedure is acquiesced in, care must be taken by the party who desires not to be precluded from further investigation to have that distinctly expressed in the interlocutor. "A remit before answer is before answer as to the matter in dispute, not before answer as to the mode of proof" (L. P. Inglis in *Pearce Brothers*, 1869, 7 M. 571): and "a remit before answer, if the parties consent to it, is conclusive" (L. Mackenzie in *Galbraith*, 1843, 5 D. 423), and bars further investigation. Where, however, the remit is merely to inform the mind of the Court, or is not assented to by either party, a reservation in the interlocutor that the remit is without prejudice to further investigation will keep matters right (*Carron Co.*, 1857, 19 D. 932); or if that is clear from the circumstances of the remit, the same result will be effected (*M'Murdo*, 1827, 5 S. 632; *Hunter*, 1827, 5 S. 633; Mackay, *Manual*, 275).

An interlocutor allowing a proof before answer does not authorise the admission of incompetent evidence. When the proof taken is before answer as to the relevancy, the question whether any particular query may be put to a witness, or whether parole proof of any of the facts in issue is competent, must be determined by the judge or commissioner according to the ordinary rules of evidence (*Robertson*, *supra*). But when the proof is taken before answer as to the competency of parole evidence, proof may be led *prout de jure*, and all questions as to the value and effect of the parole

evidence are reserved for after discussion (*Macrean*, 1873, 11 M. 506). The reservation may be made whether the proof is to be taken before a judge, a jury, or a commissioner; but as in jury trials the questions of fact are necessarily clearly separable from the questions of law, the relevancy of the averments is now invariably determined before the issues are approved of. A Sheriff Court interlocutor allowing a proof before answer is appealable for jury trial (*Stewart*, 1862, 24 D. 1442). The nature of the proof to be allowed when parties are not agreed upon it is determined in the Procedure Roll. The allowance of a proof before answer is considered pre-eminently a matter for the discretion of the judge; and unless it is clear that the averments offered for probation are irrelevant, or that proof at large is incompetent, his judgment will not, according to the present practice of the Court, be lightly interfered with on reclaiming note or appeal.

[See Ivory, *Forms of Process*, i. 219; Mackay, *Practice*, ii. 15 *et seq.*, *Manual*, 329 *et seq.*; Dove Wilson, *Sheriff Court Practice*, 161.] See Evidence; Proof; Relevancy; Remit.

Beggars.—See Vagabonds.

Behaviour as Heir.—See Passive Title.

Benefice.—This term, as now used in Scotland to represent a Church living, is applicable to parishes of which the constituent endowments are of a different order from those available when it originally came into use. There is some evidence that in early times an estate in land granted for military service was called a benefice (Craig, *Jus Feudale*, i. 14. 2; and Ross, *Lectures*, ii. 146 *et seq.*). According to Forbes (*On Tithes*, 104), so early as the twelfth century the possessions of ecclesiastics were termed benefices, "because they flowed most from pious bounty and liberality"; while Erskine (ii. 10. 4) accounts for the transfer of the term, by Canonists, to Church livings, "because these were also gratuitous rights in favour of Churchmen in consideration of their spiritual warfare." The growth of these possessions during the centuries which preceded the Reformation, which in Scotland commenced in 1560 (Elliot, *Teind Court Procedure*, 3), had been rapid and extensive. They embraced the lands which were bestowed on Churchmen, which were called *the temporality of benefices*, and the teinds, which were called *the spirituality of benefices*. The right to teinds had been generally recognised. (For a list of old parishes in Scotland, see Keith's *Scottish Bishops*, 211 *et seq.*; and in same work will be found Spottiswood's account of the Religious Houses, 381 *et seq.*)

The annual revenue from the temporality at the Reformation has been set down as equal to one-fourth part of the rents of lands in Scotland, and the revenue from the spirituality at another fourth, being together equal to a half (Mackenzie, *Obs.* 308). The estimate has been doubted (see Connell on *Tithes*, i. 73, and authorities cited, on that subject, and as to the taxation imposed on Church lands). But it was probably not far from the truth, having regard to the manner in which teinds were then uplifted, and the value of the Church lands, which, as has been observed, were some of the best in the kingdom (see also Thomas Thomson's pleading on "the old extent" as to taxation of Church lands and their value). The rental

of benefices (see ASSUMPTION OF THIRDS) made up by order of the Privy Council in 1560, is printed by Keith, Appendix B, p. 180 *et seq.*, and a summary and notes will be found in Connell, *ut supra*.

Various Acts of Parliament were passed to prevent the dilapidation of benefices (see Stewart, *Abridgement of Acts*, 28). The process had, however, begun before the Reformation, and in the course of a few years much of the Church property had changed hands. Spottiswood (*History*, 165) says that "the Churchmen who were Popish took presently a course to make away all the manses, glebes, tithes, and all other rents possessed by them to their friends and kinsmen; and most of them that subscribed (the Book of Church Order) getting into their hands the possessions of the Church, could never be induced to part therewith, and turned greater enemies on that point of Church patrimony than were the Papists or any other whatsoever." The lands thus made over were erected into temporal lordships, and the owners became "Lords of Erection," while those who obtained grants of teinds were described as "Titulars of Teinds." See as to these grants, Forbes, 97 *et seq.*

In that state of matters some difficulty was experienced in obtaining stipends for the Reformed clergy. The Privy Council, however, intervened, and stipends were awarded by a Commission out of the thirds of benefices (see ASSUMPTION OF THIRDS). There was also passed the Act 1563, c. 8, which ordained that the minister should have the principal manse of the parson, with a proportion of the glebe. And the Act 1572, c. 5, provided that he should have four acres of the glebe most adjacent to the manse, or otherways. Further provision was made by the Acts 1592, c. 10, and 1593, c. 8. The Act 1606, c. 6, provided that where there was no arable land adjacent to the kirk, the minister should be entitled to four soums grass for each acre of arable land—in all, sixteen soums, and that of the most commodious and best pasturages of any kirk lands lying nearest the kirk. The Act 1578, c. 6, declared that glebes were free from paying teind, and this immunity was extented to pasture lands, where designed from want of arable lands, by Act 1621, c. 10. The designation of glebes devolved upon the Church, and is still occasionally exercised by the Presbytery of the bounds.

Some efforts were made to recover Church lands during the reign of King James VI., and on his attaining majority the Act of Annexation, 1587, c. 29, was passed (see Kames, *Statute Law*, 197). These measures were not successfully followed up.

King Charles I. succeeded to the throne in 1625, and soon after took proceedings to recover an income from Church lands, and also from the teinds. He was successful in obtaining the latter (see ANNUITY of TEINDS), but as regards the former he completely failed. By the Act 1707, c. 84, passed immediately before the Union, all Acts of Annexation were rescinded, and the successors of the Lords of Erection remained in possession (Elliot, *Teind Court Procedure*, 205).

On the abolition of Episcopacy after the Revolution Settlement of 1688, such lands and teinds as were held by bishops fell to the Crown. (For the changes of Church government in Scotland, see CHURCH.) The other Church lands are now completely absorbed in private estates, and the Church has only possession of the small parcels which have been designed out of these lands as glebes. The modern benefice in old parishes generally includes the stipend, the glebe, and the manse. With few exceptions, the parishes erected under the Act 7 & 8 Vict. c. 44, are *quoad sacra*, with endowments chiefly provided from feu-duties and ground-annuals. (For lists

of present parishes and general statement of their endowments, see Elliot, *Teind Court Procedure*, 165 *et seq.*; see also GLEBE).

Beneficiary.—A beneficiary is the person who has the benefit or enjoyment of property, as distinguished from the person who has only the legal title to the property, the trustee. The rights of the beneficiary against the trustee are defined by the deed creating the trust, supplemented by the rules of common law, or, in the absence of any such deed, by the rules of common law alone. The beneficiary, whether the original beneficiary nominated by the truster or one substituted by assignation from the original beneficiary, has a right to call the trustee to account for his intromissions with the trust estate as a whole. This right is not affected by the fact that the beneficiary's interest in the estate is a small one (*Walcott*, 1886, 54 L. T. 786, per Bacon, V. C., at p. 789). A residuary legatee is entitled to a copy of the accounts at the expense of the estate (*Kemp*, 1863, 4 Gif. 348), but not a special legatee (*Ottley*, 1845, 8 Beav. 602), nor a person who is not *primâ facie* a beneficiary (*Martin, In re Bosworth*, 1889, 58 L. J. Ch. 432). An agent in the trust nominated by the truster is not, however, a beneficiary under the trust (*Shaw*, 1838, 5 Cl. & Fin. 129; *Finden*, 1846, 2 Ph. 142; *Knott*, 1847, 2 Ph. 192; *Foster*, 1881, 19 Ch. D. 518).

The trustee may transact with the beneficiary with reference to his interest in the trust estate, where the trustee takes no advantage of his position as trustee, and the knowledge of the trust estate thereby acquired. "A trustee," says Lord Eldon, "may buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances proving that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee" (*Coles*, 1804, 9 Ves. 234, at 246–7, 7 R. R. 167, at 175, quoted by L. Erskine, Ch., in *Morse*, 1806, 12 Ves. 355, at 373.) The burden of proof in this matter lies on the trustee (*Luff*, 1864, 34 Beav. 220, at 227; *Gray, In re Biel's Estate*, 1873, 16 Eq. 577).

The trustee is not entitled to throw on the beneficiary any responsibility for the conduct of the trust (*Life Assoc. of Scotland*, 1861, 3 De G. F. & J. 58, at 73), but he is entitled to consult with the beneficiary with a view to obtaining his opinions and feelings on any point of trust administration, provided he does not surrender his judgment to that of the beneficiary (*Robinson*, 1881, 8 R. (H. L.) 127, per L. Selborne, Ch., at 129).

By the Trusts Act, 1867 (30 & 31 Vict. c. 97, s. 7), the Court may authorise an advance to "beneficiaries having a vested interest" in a fund. This has been interpreted to mean beneficiaries having "a primary interest," although it may be contingent on survivance, as in the case of children having an interest in the fee of a fund liferented by their father, which interest does not vest in them till his death (*Pattison*, 1870, 8 M. 575). By another section of the same Statute (30 & 31 Vict. c. 97, s. 14), it is enacted that a person "beneficially entitled" to property for his own absolute use, the title to which property is in the name of a trustee who has died or become incapable, may apply to the Court to have the title made up in his own name. It has been held, in interpreting the words "beneficially entitled" here, that they do not apply to the assignee of a beneficiary, "whether for the assignee's own uses or for those of other parties" (*MacKnight*, 1875, 2 R. 667, per L. P. Inglis). Though the truster, in his discretion, may appoint a beneficiary to be a trustee, this should not, except

in extraordinary circumstances (*Curtis*, 1871, 5 I. R. Eq. 429), be done by trustees assuming a new trustee (see *Reid*, 1862, 30 Beav. 388). The truster cannot create a trust in his own favour as sole beneficiary, to the injury of his creditors. See TRUST.

Beneficiary Interest or Estate.—The interest or estate of the beneficiary under a trust is a *jus crediti* against the trustee. He has no real right in the trust property: his interest is only a personal right—a *jus ad rem*—against the trustee. The nature of the relationship of trustee and beneficiary has been variously analysed. The oldest exposition of its nature, and also that carrying most authority, resolves the trust contract into a combination of the nominate contracts of deposit and mandate (Stair, i. 12. 17, i. 13. 7; Ersk. iii. 1. 32; Bell, *Com.*, 5th ed., i. 31). "A trust is a contract," says L. P. Inglis, "made up of the two nominate contracts of deposit and mandate. The trust funds are deposited for safe custody, and the trustees receive a mandate for their administration" (*Crosherry*, 1890, 17 R. 697, at 700). The primary legal objection to this definition is that the title of a depositary and that of a trustee are fundamentally different—the one holds as an agent, and the other as a principal. There is also a fatal physical objection in the fact that it is impossible to deposit heritage. This seems to have been in the mind of Prof. Bell in writing of a "system of trusts in which the rights of all parties may be vested in the trustee, as in deposit" (*Com.*, 7th ed., i. 32). But a right to heritage is incorporeal, and can no more be deposited than an immoveable estate, like heritage itself. Further, a deposit can be called up at the will of the depositor, and a mandate revoked at the will of the mandant; but a trust, once validly created, is irrevocable by the creator thereof (cf. *Sheddon*, 1895, 23 R. 228). L. M'Laren describes a trust as "a quasi-contract distinct from mandate, but closely allied to it" (M'Laren, *Wills*, s. 1508). A trust might rather be regarded as a nominate contract, whose essentials are the transference from the truster to the trustee of the mere legal title to property, with the condition that the trustee shall transfer that property and the fruits thereof to the beneficial assignees of the truster. In each particular case, the conditions of the transference by the trustee to the beneficial assignee of the truster may vary indefinitely, and the claim of the assignee against the trustee will vary in the same degree. The essential nature of his right—that is, of the interest of the beneficiary—is, however, a claim against the trustee personally to make over to the beneficiary certain property for his use.

Beneficium cedendarum actionum.—1. *ROMAN LAW.*—This term is used by the commentators to denote the right, recognised by Roman law, of a *fidejussor*, or cautioner, who had paid, or was ready to pay, the principal debt, to demand from the creditor a cession to the rights of action competent to him against the principal debtor and the other co-cautioners, as well as an assignation of all rights in security held in respect of the debt (*Dig.* 46. 1. 13; *Cod.* 8. 40. 2). As regards the right of relief against the principal debtor, a cautioner who paid the debt was, independently of the *beneficium cedendarum actionum*, looked on as the agent of the principal debtor, and, as such, could recover from him the amount which he had paid, together with all incidental expenses, by an *actio mandati*, or, if the principal debtor were abroad, by an *actio negotiorum gestorum* (*Inst.* iii. 20. 6). As regards the right of contribution from co-cautioners, on the

other hand, it seems to be the better opinion that, in Roman law, a paying correal debtor had not, apart from the *beneficium*, a right to go against the rest, unless in special cases, as where he and they were partners, or where, and in so far as, they had been benefited by the debt which he had discharged (*Dig.* 35. 2. 62 pr; *Cod.* 8. 40. 2. But see Savigny, *Oblig.* 23–5). Accordingly, while, in virtue of the *beneficium cedendarum actionum*, a paying *fidejussor*, or cautioner, could insist on an actual *cessio*, yet, if he neglected to avail himself of the *beneficium cedendarum actionum* and of the BENEFICIUM DIVISIONIS (*q.v.*), he, like other correal debtors, had no right of recourse (*jus regressus*) against his co-cautioners (*Dig.* 46. 1. 39; *Cod.* 8. 41. 11).

In the matter of the surrender by the creditor of his actions against the co-cautioners, there arose a technical difficulty from the fact that, since the debt for which all the cautioners were liable was one debt, it was necessarily wholly extinguished as soon as it was paid by one of the co-cautioners. That being so, as the right of the creditor against the other cautioners was annihilated by the payment of the debt, there was no existent right against the co-cautioners which the creditor could convey to the paying cautioner. This technical difficulty was got over by regarding the payment by the cautioner, not as a discharge of the principal obligation, but as a purchase by the paying cautioner from the creditor of the latter's right of action against the co-cautioners. The creditor, in other words, was considered not to have received payment of the debt, but the price of the sale by him of his actions against the other cautioners (*Dig.* 46. 1. 36). In virtue of the *beneficium*, the cautioner who had paid the debt was entitled to proceed against the principal debtor for the whole debt, or against his co-cautioners for their parts, deducting that part of the debt which he, as one of the cautioners, was bound to pay. If one of the co-cautioners were insolvent, the loss fell to be borne equally, as well by him who had paid the whole debt as by the other co-cautioners (*Dig.* 46. 1. 26). The paying cautioner could not insist on the transfer of any pledge or security, if it were given for any other debt than that for which he became surety, unless he also discharged that debt (*Cod.* 48. 46. 2). On the other hand, if the creditor by his own fault was not in a position to transfer his right of action against the co-cautioners, he could not compel a cautioner to pay the whole debt (*Dig.* 46. 3. 95. 11).

2. *SCOTS LAW.*—In Scots law, the right to total relief against the principal debtor and the right to mutual relief or contribution from co-cautioners belong to any cautioner, proved to be such, who has paid the principal debt, whether he is bound in a proper or improper cautionary obligation.

In relation to the Principal Debtor.—The common-law right of a cautioner to total relief against the principal debtor rests on two distinct principles. In the first place, a cautioner who has intervened on behalf of a principal debtor is presumed to have done so under an implied mandate, so that the latter is bound to repay any money which the cautioner may have paid to the creditor on his account. Accordingly, the cautioner, upon payment of the debt, or any part of it (*Davies*, 1840, 6 M. & W. 153, per Parke, B.), to the creditor, is entitled by an *actio mandati* to take legal measures in his own person for his relief against the principal debtor, provided that at the date of payment the debt was due by the principal debtor. Of course, if the cautioner choose to pay the principal debt before the date when it is actually due, he will not be able to enforce a claim for immediate relief (*Oman*, 1833, 12 S. 130); and, equally clearly, if he pay a debt not due by the principal debtor, no

claim of relief will accrue to him, even though, in making the payment, he yielded to pressure brought to bear on him by the creditor (*Maxwell*, 1632, M. 2115). The plain duty of the cautioner in such a case is to notify to the principal debtor the fact of the creditor's demand, so that the debtor may state any defence competent to him. It is a further result of the doctrine of implied mandate, that a cautioner, on being sued for payment by the creditor, can, before himself satisfying the principal obligation, sue the principal debtor for relief. In other words, the technical "distress" to which the cautioner is subjected by being sued by the creditor, is sufficient in itself to entitle the cautioner to instant relief from the principal debtor, though he has made no actual payment (Ersk. *Inst.* iii. 3. 65). In the second place, the cautioner's right of relief rests on the principle of the *beneficium cedendarum actionum*. In virtue of this principle, a cautioner, who has satisfied the creditor, can demand to be placed in possession of all rights whatsoever held by the creditor against the principal debtor, so that he thereafter stands for all purposes in the place of the creditor. On payment of the principal debt, in short, the cautioner not only has transferred to him *de jure* the right to sue the principal debtor for relief, but also is entitled to demand from the creditor an assignation of the debt itself, of any available diligence, and of all securities for the debt which are in the hands of the creditor (Bell, *Prin.* s. 255; *Erskine*, 1780, Mor. 1386; *Gray*, 1847, 10 D. 145). As to the necessity in some cases of taking a formal assignation, see *Garden*, 1735, Mor. 3390. A full discussion of the principles regulating the cautioner's right will be found in *Sligo*, 1840 (2 D. 1478). The illustrations and applications of this principle are very numerous and important. Thus the drawer or an endorser of a bill of exchange, being in the position of a cautioner for the acceptor, is entitled to any securities deposited with the acceptor (*Duncan, Fox, & Co.*, 1880, L. R. 6 Ch. App. 1), or to what has been realised on such securities (*Gray*, 1872, L. R. 7 Ch. App. 680): and similarly, an accommodation acceptor, on paying the creditor, is entitled to all securities given by the real principal debtor (see authorities collected in Byles on *Bills*, 15th ed., note, at p. 319). The claim of the cautioner to reap the full benefit of every accessory security or remedy in the hands of the creditor for the payment of the principal debt, is equally valid whether at the date of his becoming cautioner he knew, or did not know, of the existence of the securities (*Duncan, Fox, & Co.*, 1880, 6 App. Ca. 1), or whether the securities in question were held by the creditor at the date of the contract of suretyship or only came into existence subsequently to that date (*Forbes*, 1882, 19 Ch. Div. 615). Before, however, a cautioner can demand from the creditor an assignation of securities held by him, it is necessary that he make full payment of the debt, and the payment of a dividend by the trustee on the cautioner's bankrupt estate is not full payment to this effect. Until the creditor has received full payment of the whole debt, he remains in full possession of every remedy competent to him, and is unfettered as to the mode in which he is to pursue these remedies (*Ewart*, 1865, 3 M. (H. L.) 36).

From the right of the cautioner to benefit by all securities for the debt in the hands of the creditor, there arises a corresponding duty on the part of the creditor to have regard to the prospective interests of the cautioner, and conserve them in every way. Accordingly, if, by a voluntary act, the creditor do away with, release, or lose securities held by him for the principal debt, the cautioner is freed from his obligation. The various acts of the creditor which serve thus to discharge the cautioner from his contract are treated in the article CAUTIONARY OBLIGATIONS.

In relation to Co-cautioners.—The principles regulating the claims of cautioners to mutual relief or contribution are identical in Scotland and England. The doctrine laid down in the leading English case, *Deering* (2 B. & P. 270; 1 White & Tudor, L. C., 5th. ed., 106), that contribution among co-sureties "is bottomed and fixed on general principles of justice, and does not spring from contract, though contract may qualify it," was expressly adopted by the House of Lords as equally applicable to Scotland in *Stirling* (1825, 3 Bligh, 575, *vide* per L. Redesdale). As the right of mutual relief among cautioners exists apart from any assignation, a cautioner who makes payment of the principal debt requires no assignation from the creditor to enable him to sue his co-cautioners for their share of the debt (Bell, *Prin.* s. 62: *Finlayson*, 1827, 6 S. 264; cf. *Graham*, 1885, 12 R. 583; Stair, i. 8. 9). At the same time, if a cautioner, on paying the debt, demands an assignation, the creditor is bound to grant it (*Gilmour*, 1832, 12 S. 193). The extent of the paying cautioner's right under an assignation, however, is not greater than it is at common law, *i.e.* he is entitled only to proportional relief from the rest (*Anderson*, 1884, 21 S. L. R. 787). Nevertheless, there is in some cases an advantage in taking such an assignation. For a cautioner who has paid the debt cannot, without a formal assignation, enforce his claim of relief against his co-cautioners by any other means than by bringing an action of relief; whereas, by getting an assignation of the bond, he may at once charge his co-cautioners upon the bond for relief (*Erskine*, 1842, 4 D. 1476, per L. Fullarton, at 1480). Cautioners, further, have a right to benefit by any security, ease, or relief which may have been obtained by any of their number from the person for whom they intervened (Ersk. *Inst.* iii. 3. 70; Bell, *Com.* i. 367, M'L. ed.; *Steel*, 1881, L. R. 17 Ch. Div. 825). A security obtained by one of several cautioners is none the less liable for the mutual relief of all, although it does not become available till after the debt is paid. On becoming available, the security will be applied towards refunding the co-cautioners for the payments made by them on account of the principal debt (*Berridge*, 1890, L. R. 44 Ch. Div. 168). A security, however, which has been obtained by a cautioner, not from the principal debtor, but from a third party, need not be communicated to fellow-cautioners; for clearly the estate of the principal debtor is in no way lessened, and consequently the burden of the debt on the other cautioners is in no way increased, by its having been granted (*Coventry*, 1830, 8 S. 924). Nor will a cautioner be compelled to communicate a security, even where it is obtained from the principal debtor, if it was given as a condition of his undertaking the obligation, and with the consent of his co-cautioners (*Hamilton*, 1889, 16 R. 1022). A full discussion of the principles applicable to this subject in Scots law, and their relation to the doctrines of Roman law, is contained in an essay on the "*Beneficium cedendarum actionum*," by Lord Kames, published in his *Essays on Law*, 1722, Edinburgh. See CAUTIONARY OBLIGATIONS.

Beneficium competentiæ.—*In Bankruptcy.*—Subject to what follows with regard to the case of salaries or earnings accruing after sequestration, it may be stated that the law of Scotland does not recognise any right on the part of a bankrupt under sequestration to *beneficium competentiæ* out of the estate vesting in his trustee. The wearing apparel of the bankrupt and of his wife and family forms the sole exception from the statutory adjudication (19 & 20 Vict. c. 79, s. 95). Any allowance for maintenance is the free gift of the creditors (*ib.* s. 78). It has never

been decided to what extent, if any, the trustee can claim personal earnings of the bankrupt subsequent to the sequestration (see *Barron*, 1881, 8 R. 933; Goudy on *Bankruptcy*, 276); but an opinion has been expressed that he cannot claim these (see *Barron, ut supra*, per L. Fraser, Ordinary), on the ground that creditors have no power to make a bankrupt labour for their benefit. It seems hardly doubtful that in any case the claim of the trustee would be subject to the bankrupt's right to retain a sufficiency for the maintenance of himself and his wife and family. In England the right of the creditors is denied save as to any surplus saved by the bankrupt, after providing for such maintenance, on the ground that creditors have no right or power to make a slave of their debtor (*ex parte Vine*, 1878, 8 Ch. Div. 364; *Emden & Carte*, 17 Ch. Div. 768; see Goudy on *Bankruptcy*, 281). Where a bankrupt is, at the date of his sequestration, the holder of an office with a definite salary attached, the right of the trustee seems to be to demand the emoluments of the office so far as in excess of what is a reasonable *beneficium competentiæ* in the circumstances (*Laidlaw*, 1801, M. App. *voce* Arrestment, No. 4; see *A. B.*, 1824, 3 S. 133; *Moinet*, 1833, 11 S. 348; *Barron, ut supra*). Government pay, half-pay, salaries and pensions, are excluded from arrestment at common law on grounds of public expediency (Bell, *Com.* i. 123–4). The Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), however, provides machinery whereby a trustee in sequestration may obtain from the Court an order for payment to him of such portion thereof as the heads of the particular department may consent to (*ib.* s. 149). But only the excess above a *beneficium competentiæ* will be ordered to be paid to the trustee. Thus a bankrupt was allowed to retain a post-office pension of £46 per annum, although the Postmaster-General had granted the requisite consent to £10 a year being paid to the trustee (*Scott*, 1885, 12 R. 540). A bankrupt *in cessio* is entitled to retain his working tools (*Reid*, 1778, Mor. 1392); but has no right of *beneficium competentiæ* out of his estate (Bell, *Com.* ii. 483; More's *Notes to Stair*, ccccxxxvii.; Erskine's statement to the contrary (iv. 3. 27) is not supported by any case). And in one case the Court refused to include under the description of instruments of trade the furniture of a teacher of languages (*Gassiot*, 12 Nov. 1814, F. C.). Although cessio does not include *acquirenda*, it may be made a condition of granting decree of cessio, on a petition at the instance of the debtor, that he assign to his creditors future earnings from an office held by him so far as exceeding *beneficium competentiæ*. Thus a clergyman with a stipend of £100 was held bound to assign £20 a year thereof (*Simpson*, 1888, 16 R. 131); and in another case a debtor with a net income from salary and commissions of £90 a year was held bound to assign a like sum (*Calderhead*, 1890, 17 R. 1098; see also cases cited in Bell, *Com.* ii. 483–4).

Beneficium competentiæ. — *Roman Law.* — By the Roman law the debtor in certain obligations was allowed to retain as against his creditor so much of his means as would suffice for necessary maintenance. The commentators have termed this privilege *beneficium competentiæ*; the Roman lawyers describe it as a restriction of decree *in id quod facere debitor potest*. Originally, this expression only meant that the privileged debtor must not be decerned against for a larger sum than he was worth at the moment, the rest of the claim being discharged. Subsequently a more liberal construction of the words was admitted, and the creditor was not allowed to exact the debtor's whole means, but only so much as he could pay without falling into indigence (*Dig.* 50. 17. 173).

The unpaid balance of the debt remained owing as a natural obligation, and it was recoverable by action, if the debtor's circumstances afterwards improved (*Code*, 5. 18. 8). A person entitled to the privilege had the right to retain the necessary means of subsistence (*ne egeat*), not a sum adequate to his rank in life. In calculating how much he was in a position to pay, his other debts were not deducted, except in the single case where the demand was for payment of a donation (*Dig.* 24. 3. 54).

The privilege was pleaded as a defence (*exceptio*) to the creditor's action: it was also competent to maintain it in the *actio judicati* (action to enforce the judgment recovered). It did not receive effect in actions *ex delicto*, nor in actions based on fraud; and it was excluded in so far as the debtor had fraudulently made away with his estate. The benefit was personal; it did not pass to heirs, and it did not avail sureties for the debt.

The privilege had a wide range of application. It was granted sometimes (1) on the ground of a special personal relation between the parties to the obligation, as where the one was the ascendant or descendant, or spouse, or patron of the other: sometimes (2) on account of the special character of the obligation: *e.g.*, in an action by the wife for return of her dowry, in an action to enforce a promised donation, in an action between partners suing any claim arising out of the partnership, the defender had this benefit: and (3) where some peculiarity in the position of the debtor seemed to require it; thus persons who had made a *cessio bonorum* could plead it against their creditors claiming their after-acquired property; children recently emancipated could plead it if sued for debts contracted while subject to *potestas*, unless the father had left them a sufficient provision; and soldiers were thus favoured against all claims whatever (see *Inst.* iv. 6. 37–9, and *Dig.* 42. 1, *passim*). Lastly, the privilege might be conventional; it appears from *Dig.* 2. 14. 49, that it could be stipulated for at the making of any contract.

Scots Law.—The *beneficium competentiæ* has never had the same range in our law as it had in the civil law. It has only been recognised to a limited extent in the law of donation and bankruptcy (for the latter, see *supra*).

It is allowed to fathers and grandfathers with respect to provisions granted to children and grandchildren, even though the result should be to leave the children destitute (*Buntin*, 1745, Mor. 2895; *Hogs*, 1750, 1 *Paton*, 469; *Hardie*, 1 July 1813, F. C.); the rule is a corollary from the obligation of the descendants to support their indigent parents. But the benefit is not extended to collateral relations, not even to a brother against his sister (Ersk. *Inst.* iii. 3. 89).

Beneficium divisionis.—*Roman Law.*—As cautioners in Roman law were liable *singuli in solidum*, any one of several cautioners might be sued by the creditor for the whole debt, and, if so sued, must pay the whole of it. This was altered by an epistle of Hadrian, which introduced the so-called *beneficium divisionis*. In virtue of this privilege, the cautioner was enabled, when sued by the creditor, to demand that, if the other co-cautioners were solvent, the creditor should divide his claim between him and them. This demand took the form of an Exceptio (*q.v.*), or defence to the creditor's action, and its effect was to compel the creditor to sue each cautioner only for an aliquot part, determined by the number of solvent cautioners (*Code*, 4. 18. 3; *Inst.* iii. 20. 4; Gaius, 121–2). The form of the *exceptio* is given in *Dig.* iii. 46. 1. 28. If a cautioner on being sued neglected to avail himself of the *beneficium*,

or if all the other co-cautioners were insolvent, he might still have to pay the whole debt. When two debtors (*correi*) had cautioners bound for them separately, the creditor in the debt could not be forced to divide his claim among all the cautioners, but only among those bound for the same debtor (*Dig.* 46. 1. 51. 2). So the cautioner for a cautioner could not insist that the creditor's action should be divided between himself and the person for whom he is cautioner, because the latter, in respect to the person who became his surety, is a principal debtor (*Dig.* 46. 1. 27. 4). As the co-tutors of a pupil were each liable for the default of the others, they were really reciprocally cautioners for each other, and the *beneficium divisionis* was fully applicable to their case.

Scots Law.—In Scots law the *beneficium divisionis* applies where there are several cautioners bound simply or conjunctly for the principal debtor in a "proper" cautionary obligation. The effect of the right is that where the obligation is divisible, as for a sum of money, each of the cautioners is, in the first instance and so long as his co-cautioners are solvent, liable only for his own proportionate share of the debt. In other words, none of the cautioners can, in the first instance, be sued by the creditors for more than his *pro rata* share of the sum due (Ersk. *Inst.* iii. 3. 63; Bell, *Prin.* s. 267). Whether it is competent for the creditor in such a proper cautionary contract to sue certain of the cautioners for their respective *pro rata* shares, without calling the others, appears doubtful. On the one hand, it is laid down by Prof. Bell that, where co-obligants are bound jointly, each may refuse to pay till all the co-obligants are called (Bell, *Prin.* s. 62). On the other hand, it has been held competent for a creditor to bring an action against two of three obligants in a bond for payment of their respective shares, without calling the representatives of the third, who was deceased (*Macarthur*, 1836, 15 S. 270). When the obligation is an indivisible one, on the other hand, such as a bond for the performance of an act, as, for example, to retire a bond (*Grant*, 1721, Mor. 14633), each of the co-cautioners is, even in a proper cautionary, liable for the whole (*Grott*, 1672, Mor. 14631; *Dickson*, 1697, Mor. 14632), unless and until the liability thereunder takes the form of a claim by the creditor for damages, when the right of division again emerges (*Dennistoun*, 1669, Mor. 14630). The rule also suffers exception when the co-obligants, though bound simply, are in the position of partners (*Mushet*, 1710, Mor. 14,630; *Weston's Trs.*, 1894, 20 R. 72), or when the cautionary obligation is constituted through the medium of a bill or note. Ultimately, of course, each cautioner, even in a proper cautionary, may become liable to the creditor for an amount exceeding his proportionate share—up, indeed, to the whole amount due by the principal debtor; for, on the insolvency of one of the obligants, the creditor can compel the other obligants to make up his share in equal parts, and if there is only one solvent obligant, he thus becomes liable *in solidum* to the creditor (Bell, *Prin.* s. 267, and authorities there cited). Cautioners, it is to be observed, who are bound in an improper cautionary obligation,—that is, who are bound as co-obligants with the principal debtor, or as full debtors, or conjunctly and severally,—never have the benefit of division. By binding themselves in this form, they renounce the benefit of division, just as they, before the Mercantile Law Amendment Act, renounced the benefit of discussion. The result is that, in a so-called improper cautionary obligation, the creditor may, on the arrival of the term of payment, at once proceed against any one of the co-obligants whom he may select, for the whole sum due, or against the several obligants in such sums or proportions as he pleases (*Richmond*, 1847, 9 D. 633).

Beneficium inventarii was the benefit which an apparent heir in heritage derived from serving to his ancestor, under reference to a recorded inventory of all the estate to which he succeeded. By the early law the entry of an heir subjected him to liability for all the predecessor's debts, but, following the example of the Roman law, the Legislature provided a mode by which, as in moveable succession, an heir might enter upon inventory without being liable beyond the value of the estate.

1. *Procedure.*—The Act 1695, c. 24, required the apparent heir, who desired the benefit, before the service proceeded, and within year and day of the succession opening, to lodge a full and particular inventory, signed before witnesses and sworn to as correct, "of all lands, houses, annual rents, or other heritable subjects," to which he "may or pretend to succeed," with the sheriff clerk of the shire where the lands were situated, or, if no sasine was required, with the clerk of the shire where the ancestor died. Upon being signed by the heir, the Sheriff, and the Clerk of Court, all before service, the inventory had to be recorded in the Sheriff Court Books within the *annus deliberandi*. An extract had also to be recorded in the special register kept for that purpose in the Books of Session. Where the apparent heir was posthumous the time ran from his birth, and where he succeeded a prior apparent heir, from the date when the succession opened (*Bruce*, 1704, Mor. 5329). Where, from inevitable or peculiar circumstances, the inventory could not be, or had not been, recorded within the statutory period, the Court allowed an extension of the time (*Finlayson*, 1838, 16 S. 1270; *Anderson*, 1838, 1 D. 268). The heir lost the benefit (1) by wilful omission, (2) if he accidentally omitted any subject, and did not add it by a recorded eik to the inventory within forty days after the fact came to his knowledge, and (3) if he intromitted with the heritage except for purposes of custody or preservation (see PASSIVE TITLE), or expeded even a general service before giving up the inventory. The lodging of the inventory did not infer a passive title. If the heir completed and gave up the inventory within the prescribed time, he could enter by service when he pleased. The decree of service refers to the inventory.

2. *Rights of Heir and Creditors.*—If the creditors did not oppose, the heir, served *cum beneficio*, could have the value of the inventory judicially ascertained, and could thereafter sell the subjects and pay the creditors in the order of their application, provided he did so without favouring any particular creditor. But if any creditor interposed by citation, the heir had to bring a multiplepoinding, and have the price divided according to the priority of the creditors' diligences (*Scot*, 1724, Mor. 5336). The heir was entitled to bring the estate to judicial sale under the Statute 1695, c. 24 (*Rutherford*, 1748, Mor. 5353; *Blair*, 1751, Mor. 5353).

Any creditor whose right was complete by sasine, or made real by adjudication, if dissatisfied with the value of the inventory, might insist that the heritage be put up to public sale (*Murray*, 1736, Mor. 5346; *Strachan*, 1738, Mor. 5348).

The heir who entered *cum beneficio* was regarded as a trustee for creditors —(1) thus, when he took possession without having had the value judicially ascertained, he was held liable for the enhanced value of the lands by improvements subsequent to the inventory (*Aikenhead*, 1727, Mor. 5344); (2) he was also bound to give the other creditors any benefit he had received in transacting with any particular creditor (*Aikenhead*, 1725, Mor. 5342).

3. *Summary.*—The main effects of this form of service have been summed up as follows: (1) The heir was only personally liable for the debts of the deceased, and the demands of creditors against him were

limited to the amount of the inventory; (2) he might satisfy any creditor on demand; (3) he became absolute proprietor, and might dispose of the estate as he pleased, unless prevented by diligence; (4) the creditors could demand that the estate itself should be given up to them if the heir did not pay the ancestor's debt, and the heir was not entitled to insist on paying to them only the value of the estate (*Strachan*, 1738, Mor. 5348).

4. *Later Legislation.*—This mode of service has been superseded by the relative provisions of the Titles to Land Consolidation (Scotland) Act, 1868 (incorporating ss. 23 and 25 of the Service of Heirs Act, 1847), and the Conveyancing (Scotland) Act, 1874. The Act of 1868 enacted, (1) by s. 47, that a decree of special service should not infer representation for the ancestor's debts beyond the value of the lands embraced in it; and (2), by s. 49, that by annexing a specification of certain lands to the petition for general service, and by having it embodied in the decree, the heir served should be liable for the deceased's debts and deeds only to the extent or value of the lands in the specification. The Act of 1874 still further simplified matters, by providing (s. 12) that an heir should not be liable for his ancestor's debts beyond the value of the ancestor's estate to which he succeeded.

[Stair, iii. 4. 32; More's *Notes*, 321; Bankt. ii. 311; Ersk. iii. 8. 68–71; Bell, *Com.* i. 706; Bell, *Prin.* s. 1926–28; Menzies, *Convey.* 803; Bell, *Convey.* ii. 1114.]

See SERVICE; SUCCESSION.

Beneficium ordinis, excussionis, or **discussionis.**—Justinian, by his fourth Novel, conferred upon cautioners the privilege designated by the commentators *beneficium ordinis*, or, as it is otherwise frequently termed, *beneficium excussionis* or *discussionis*. Under this enactment the creditor in a cautionary obligation, at least where both the principal debtor and the cautioner were within the same jurisdiction, was bound to sue the principal debtor first, and could only sue the cautioner for that portion of the debt which he could not recover from the principal debtor. If the principal debtor was beyond the jurisdiction, the cautioner could be sued in the first instance; but he might petition the judge for time to procure the appearance of the principal debtor. If the principal debtor was produced, the cautioner was meanwhile released from the creditor's action; but if, within a given time, he did not succeed in procuring the appearance of the principal debtor, he must discharge the obligation himself. An exception to the *beneficium* was subsequently introduced by Justinian for the convenience of trade, money-dealers (*argentarii*) being allowed, at their option, to sue the cautioner without first suing the principal debtor (*Nov.* 136. 1). For Scots law, see DISCUSSION.

Bequest.—See LEGACY.

Berthenseck.—See BURDENSECK.

Best Evidence.—The rule which requires the production of the best evidence operates to exclude evidence, the substitutionary or secondary nature of which implies the existence of original or primary evidence (see

M'Neill, 1880, 7 R. 574). This rule is concerned with the character, not with the strength or amount of the evidence; and accordingly, if a person can prove his case in more ways than one by evidence, all primary and admissible in itself, he may take any way he chooses (*Thom*, 1850, 13 D. 143, per L. Fullerton). Still, it may be matter for observation if he choose to rest his case on inferior primary evidence, when better is to be had. In prosecutions for forgery, he whose signature is said to be forged, *e.g.* a bank official, must be examined, or his absence must be accounted for (*Bryson*, 1834, 12 S. 937; *Kennedy*, 1829, Bell's *Notes*, 61; *Robb*, 1832, *ib.*: Macdonald, *Criminal Law*, 487). It is thought that it is not obligatory upon the challenger of a deed to adduce the writer or the instrumentary witnesses (Dickson, ss. 913, 914; Best, s. 232; Taylor, s. 393; *Forster*, 1869, 7 M. 797; affd. 1872, 10 M. (H. L.) 68). The application of the general rule is seen in the exclusion (1) of evidence as to the terms of documents other than the documents themselves, and (2) of hearsay evidence.

(1) The terms of a document in existence and accessible cannot be proved either by parole or by a copy or excerpt. Thus parole is inadmissible to prove what the law requires to be in writing, *e.g.* convictions, and dispositions of heritage (see Bills of Exchange Act, 1882, s. 100; *National Bank of Australasia*, 1891, 18 R. 629, as to a bill of exchange). The rule applies to such official narratives as a judge's notes (cf. *Dobie*, 1861, 23 D. 1139, with *Willox*, 1848, 10 D. 807), messengers' executions, or notarial instruments (see also Books; Registers); and reduction to writing of a contract in itself provable by witnesses will exclude parole proof, whether the writing be probative or validated *rei interventu* (see *Clark*, 1860, 23 D. 74; *Buchanan*, 1895, 33 S. L. R. 200). Parole is inadmissible to prove the terms of a document which parties have verbally agreed to make the measure of their contract (see *Menzies*, 1851, 13 D. 1044; *Neilson*, 1886, 13 R. (H. L.) 50, 54); or to establish the existence or terms of an instrument, when either is material to the issue (see *Ruit*, 1859, 21 D. 965). This rule is strictly applied in examination-in-chief (*e.g. Aitchison*, 1846, 9 D. 15); but is relaxed somewhat in cross-examination, when a witness' statement is misleading, if unexplained. Parole is admissible, however, where the document is a mere narrative of facts, in proof of which an official statement in writing is not indispensable (*Mackenzie*, 1827, Syme, 158; *Stewart*, 1855, 2 Irv. 166; *Willox*, 1848, 10 D. 807; *Inglis*, 1852, 1 Macq. 112); and, in criminal cases, this principle has been applied in proving inscriptions on flags, and resolutions read at meetings (Dickson, s. 226). Facts collateral to the transaction set forth in a document may also be proved by witnesses (see *M'Alister*, 1862, 24 D. 956). Moreover, the general rule is relaxed where a question as to a *factum proprium*, which is not part of the matter directly in issue, arises incidentally (*Johnston*, 1845, 2 Broun, 401; *Black*, 1857, 2 Irv. 583); or where there is a strong presumption in favour of the existence of a document, as when a person acts as in virtue of a written appointment (see *Borthwick*, 1862, 1 M. 94, 103); or where the evidence required, *e.g.* as to the state of accounts between parties, is the result of an examination of numerous documents. But the witness must speak as to the fact only, and not as to his opinion thereon (Dickson, ss. 221, 222; Taylor, s. 462). So, too, parole may be admissible where the documents cannot be produced, or are lost or withheld (see *infra*).

Save in the case of official copies of documents and of extracts from official records (see Books; Copies and Extracts; Transumpts), the general rule applies to exclude a copy of, or an extract from, a document in existence and accessible. Nor will either be admissible even if taken before a Com-

missioner of Court (COMMISSION), unless insistence on the production of the original documents would occasion grave inconvenience to those to whom they belong, *e.g.* where they are required for carrying on the business of a public office or a company (*Mackintosh*, 1829, 8 S. 184; *Thom*, 1850, 13 D. 134); or where they contain entries which do not affect the case, but relate to the affairs of persons who have no concern with it (*Thom, supra*; *Wilson*, 1851, 14 D. 1). All printed copies struck off in one common impression are primary evidence of each other (*Watson*, 2 Starkie R. 129); and instruments executed in duplicate and signed are admissible as principals. In England each duplicate, if signed by one party only, is held to be best evidence against that party, and secondary evidence of the terms of the other duplicate (Dickson, s. 228; cf. *Smith*, 1701, Mor. 16987). Where goods have been sold through a broker, the best evidence is the bought and sold notes, and, failing them, the broker's book. It is doubtful if the book may be resorted to, when the notes differ (Taylor, ss. 420–3; *Dickson*, s. 229). The copy of a lease has been admitted when it was the title upon which the tenant had possessed the subjects (*Williamson*, 1834, 12 S. 466; *Carruthers*, 1836, 14 S. 464; cf. *Grant*, 1861, 23 D. 796). A press copy has been admitted when the original could not be produced, and the identity of the copy with it was indisputable (*Clements*, 1866, 4 M. 543). As to the admissibility of photographic and lithographic copies in questions of handwriting, see COMPARATIO LITERARUM: OPINION EVIDENCE. Copies and extracts, except when admitted of consent (see Dickson, ss. 227 (*c*), 235, and Admissions (*a*)), or declared by Statute to be evidence, must be proved to be correct. In the case of a copy taken on commission, it will be sufficient, save, perhaps, in jury trials (*Reid*, 1836, 14 S. 720; *Gray*, 1849, 12 D. 438; see *Thom*, 1850, 13 D. 134), if it be certified by the commissioner as to his knowledge correct (*Summers*, 1842, 4 D. 347; *Thom, supra*). In England a copy of a copy is inadmissible (Taylor, s. 553).

Secondary evidence of the contents of a document is admissible when the original cannot be produced, *e.g.*, in the case of inscriptions on walls, monuments, gravestones, etc. (Taylor, s. 438; Dickson, s. 239), or of foreign registers or documents in the custody of foreign Courts (*Maitland*, 1885, 12 R. 899; the proper course is to call the custodier as a witness). The rule applies when the document is withheld by the person required to produce it (*Mitchell*, 1845, 7 D. 382; cf. *Cameron*, 1872, 10 M. 301); and if traced into his hands, he must prove that he has it not (*Lauderdale Peerage Case*, L. R. 10 A. C. 692). On the same principle, the photograph of a defender cited, but who does not appear, may be used for purpose of identification (*L.* v. *L.*, 1890, 17 R. 754). Moreover, such evidence is admissible when the original has been lost or destroyed without fault in the person founding on it. If it has been lost in his hands, this principle is applied less easily (*Schuurmans*, 1832, 10 S. 839). It is applied more readily *contra spoliatorem* (see PROVING THE TENOR); or where the original is old, and the substitutionary evidence is produced from the proper custody (*Bullen*, 4 Dow, 297; *Crawford and Lindsay Peerage Case*, 2 H. L. C. 534; *Lauderdale Peerage, supra*). Observe that when the document forms the basis upon which the party can alone proceed, an action of proving the tenor is necessary (*Drummond*, 1834, 7 W. & S. 564; cf. *Gilchrist*, 1891, 18 R. 599. See PROVING THE TENOR). In order to let in secondary evidence in such cases, the person founding on the document must make out to the satisfaction of the judge a sufficient *casus amissionis* (Dickson, s. 240; see CASUS AMISSIONIS); he must show that his search has been careful, diligent, and *in bonâ fide*

(*Lord Melville's Trial*, 1806, 29 How. St. Tr. 690–703; *A.* v. *B.*, 1858, 20 D. 407; *Clark*, 1860, 23 D. 74; *Russell's Trs.*, 1862, 24 D. 1141; *Clements*, 1866, 4 M. 543; see Taylor, s. 429 *et seq.*; and that the original was itself admissible (*Drummond*, 1835, 7 W. & S. 564; *Winchester*, 1863, 1 M. 685; *Rannie*, 1891, 18 R. 903. See ADMINICLES). In the absence of contrary evidence, it will be presumed that the lost document was duly stamped (see PRESUMPTIONS). It has been held in England that where a deed has been executed in duplicate or triplicate, all the parts must be accounted for before secondary evidence can be admitted (*Castleton*, 6 Durn. & E. 236); but the principle is not applied to counterparts (*Doe* v. *Ross*, 7 M. & W. 102; *Hall*, 3 Man. & G. 242). The English rule that there are no degrees of secondary evidence save where the law substitutes some special species thereof—*e.g.* certified copies—in place of primary proof, appears to be well founded. It applies to the admissibility, not to the weight, of the evidence (Taylor, s. 550 *et seq.*; Dickson, s. 242). As to the admissibility of secondary evidence of an obligation contained in a deed requiring a stamp, but unstamped, see STAMPS.

(2) Hearsay evidence, *i.e.* the evidence of one who does not speak to the matter in question from personal knowledge, but repeats what an actual witness has related or admitted regarding it, is inadmissible; and it is *pars judicis* to exclude it (*Morton*, 1830, 4 W. & S. 379, 388). Observe, however, that a statement may be proved as primary evidence when the question is, not whether it is true, but whether it was made (*Coles*, 1895, 22 R. 716), Thus proof of a person's conversation is admissible to show his feelings and beliefs. This principle has been applied to prove, in an action of damages for adultery, the terms on which the spouses lived before the seduction (*Kirk*, 1817, 1 Murray, 275; Taylor, s. 582); in a peerage case, the reception of the claimant by the family (*Douglas Cause*, 1769, 2 Pat. App. 146; *Townsend Peerage*, 10 H. of L. Ca. 289); in an action by a husband on a policy, the state of the insured's health (*Aveson*, 6 East, 188; Taylor, s. 580; but see *Hall*, 1818, 1 Murray, 442); and in a question of sanity, the state of a person's mind (*Mackintosh*, 1859, 21 D. 783; cf. *Cairns*, 1850, 12 D. 919, 1286; 1851, 1 Macq. 212). So also proof of the existence of general reputation, reputed ownership, public rumour, etc., is admissible (Stair, iv. 43. 15; Dickson, s. 248; Taylor, s. 577; cf. *Du Bost*, 2 Camp. 512). Thus, evidence that a slander was currently reported, while competent in mitigation of damages, is inadmissible to prove *veritas convicii* (*Maceulloch*, 1851, 13 D. 960). Statements, otherwise inadmissible as hearsay, may be proved when they form part of the *res gestæ*, *i.e.* "the whole thing that happened." Thus proof of cries of a mob are admissible to show its purpose. But statements amounting merely to a narrative of a past occurrence are not receivable (2 Hume, 406, note; *Gordon*, 21 How. St. Tr. 542; *Rouch*, 1 Q. B. 63; *Hunter*, 1838, 2 Swin. 12; *A.* v. *B.*, 1858, 20 D. 407; *Simpson*, 1870, 1 Coup. 437; *Greer*, 1882, 9 R. 1069; Taylor, s. 583 *et seq.*). Where the commission of a crime is alleged (see Dickson, s. 262, as to civil cases), a statement made shortly thereafter by the injured party is admissible (2 Hume, 406, note; *M'Kay*, 1823, 2 Al. 514; *Kelly*, 1829, Bell's *Notes*, 288; *Hardie*, 1831, Shaw, 237; *Moran*, 1836, 1 Swin. 231; see *Hill*, 1847, 10 D. 7); and in cases of rape a wider latitude is allowed (1 Hume, 309; 2 Hume, 407, note; *Grieve*, 1833, Bell's *Notes*, 238; *M'Millan*, 1833, *ib.*). An accused has been permitted to prove his statements *de recenti* to show the consistency of his story (*Forrest*, 1837, 1 Swin. 404); and, in the case of a child-witness, such a statement has been received in corroboration of its evidence (*Stewart*, 1855, 6 Irv. 166). The extrajudicial

statements of a witness may be adduced in support or contradiction of his sworn deposition (15 Vict. c. 27, s. 3; *Emslie*, 1862, 1 M. 209), a foundation having first been laid for the introduction of such evidence (*Clark*, 1862, 24 D. 1321; *Ross*, 1863, 1 M. 783; *Gall*, 1870, 9 M. 177). Opinions conflict as to whether a witness can be contradicted by what he said on precognition (*O'Donnell & Macguire*, 1855, 2 Irv. 236; *Emslie, supra*. Dickson, s. 265; Macdonald, *Criminal Law*, 473, are against the admission of such evidence, at all events in criminal cases; *contra, Fraser*, 1842, 4 D. 1171; *Inch*, 1856, 18 D. 997; *Luke*, 1866, 5 Irv. 293; *Robertson*, 1873, 2 Coup. 495; Kirkpatrick, s. 38, 189; cf. *Robertson*, 1842, 1 Broun, 152). The statement of a person deceased is admissible, whether produced through the medium of a witness or of writing, provided that the dead man was admissible as a witness when he spoke, that the circumstances under which he made it were not such as to colour or distort it, and (especially in pedigree cases) that he had some special knowledge of the thing about which he spoke (*Geils*, 1855, 17 D. 397; *A.* v. *B.*, 1858, 20 D. 407; *Macpherson*, 1876, 4 R. 132; 1877, 4 R. (H. L.), 87; *Lauderdale Peerage*, L. R. 10 App. Ca. 692; *Lovat Peerage, ib.* 763; *Rae*, 1888, 2 White, 62; *Wallace*, 1891, 19 R. 233). Still it is to be received *cum notâ*, as it is impossible to test it by cross-examination: and, if ambiguous, *contra proferentem* (*Walker's Trs.*, 1880, 7 R. (H. L.) 85). To let in evidence of the deceased's statement, his death must be proved; and for this purpose hearsay has been admitted (*Christian*, 1818, 1 Murray, 424; *Miller*, 1820, 2 Murray, 325). The principle has been extended to the case of a person confined abroad as prisoner of war (*Cleland's Crs.*, 1708, Mor. 12634), or hopelessly insane; but not to the case of a person who cannot be found (*Monson*, 1893, 1 Adam, 114). The deposition of a haver deceased is inadmissible in relation to the merits of the cause (Dickson, s. 270). The precognition of a person deceased will not be received (*Dysart Peerage*, L. R. 6 App. Ca. 489; *Lauderdale Peerage, supra*; *Lovat Peerage, supra*; cf. *Stevenson*, 1893, 31 S. L. R. 129); and the same principle has been applied to his voluntary affidavit (*Mags. of Aberdeen*, 1813, Hume, D. 502), to his deposition made in another cause (*Gordon*, 1850, 13 D. 1; see *Geils, supra*), to an entry in his diary (*Smith*, 1857, 2 Irv. 641), and to his admission on record (*Cullen's Tr.*, 1865, 3 M. 935), on the ground that they were emitted in circumstances such as to suggest that they give a distorted version of the facts. Where there is no such suggestion, certificates, affidavits, a draft pedigree compiled by an ancestor of the claimant to a peerage, etc., have been admitted in civil cases where the matter in dispute was ancient (*Lauderdale Peerage, supra*; *Crawford and Lindsay Peerage*, 2 H. L. Cas. 534. See Books). As to the cases in which hearsay of hearsay is admissible, see *Smith*, 1826, 5 S. 98; *Lovat Peerage, supra*.—[2 Hume, 406; Dickson on *Evidence*, ss. 195 *et seq.*; Taylor on *Evidence*, ss. 391 *et seq.*; Best on *Evidence*, ss. 492 *et seq.*; Kirkpatrick, *Digest of Evidence*, ss. 6, 35 *et seq.*] See Books; Copies and Extracts.

Bestiality.—Connection between a man and a lower animal is criminal. This offence was formerly capital, and it was held in such abhorrence that the sentence of death was generally executed in some unusual way. Erskine says (iv. 4. 57) that "the ordinary punishment is burning." In the cases cited by Hume (i. 470), the condemned were either drowned or strangled at a stake, the bodies of those who were strangled being afterwards burned. The crime is no longer capital (Crim. Proced.

Act, 1887, s. 56), but a long sentence of penal servitude would follow a conviction for this offence.

Attempt to commit the crime was formerly a relevant charge at common law (Hume, i. 470; Alison, i. 567; *Pottinger*, 1835, 1 Swin. 5; *M'Givern*, 1845, 2 Broun, 444). Attempts are punishable by an arbitrary sentence. Under sec. 61 of the Crim. Proced. Act, 1887, it is competent to charge with an attempt, or to convict of an attempt, where a completed crime has been libelled.—[Macd. 204; Anderson, *Crim. Law*, 93.]

In England, prior to the Reformation, this crime was punishable only by ecclesiastical censures. It was made felony, without benefit of clergy, by 25 Hen. VIII. c. 6. By the Act 9 Geo. IV. c. 31, the crime was made capital. This Statute was repealed by 24 & 25 Vict. c. 95, and now, by 24 & 25 Vict. c. 100, the punishment of this offence is declared to be penal servitude for life, or not less than ten years (Steph. *Com.* 12th ed., iv. 208).

Betting.—See GAMING.

Bigamy.—This crime consists in the felonious contracting of a second marriage during the subsistence of a prior one. Bigamy is criminal both by Statute and at common law. By the Act 1551, c. 19, it is provided that "whatsumever person marries twa sindrie wivis, or woman marries twa sindrie husbands, livand together, undivorced lawfully, contrair to the aith and promise maid at the solemnization and contracting of the matrimony, and swa are of the law perjured and infamous, therefore, that the pains of perjuring be execute upon them with all rigour." The Statute sets forth what the pains of perjury are: "That is to say, confiscation of all their gudes moveable, warding of their persons for yeir and day, and langer during the Queene's will, and as infamous persons, never able to bruick office, honour, dignitie, nor benefice in time to cum." This Act had reference to a time when all marriages were celebrated by a formal and regular solemnization. The essence of the crime, in the view of the Statute, consisted in the violation of this solemn vow, and so it was appropriately punished, as a religious offence, by the pains of perjury.

Bigamy cannot be committed unless there have been two marriages.

1. *As to the Form of the Marriages.*—Hume and Alison have incorrectly stated the law on this point. Alison says (i. 536) that both marriages must have been formal and regular. This is erroneous; and it is now clearly settled that neither marriage need be regular (see *Brown*, 1846, Ark. 205—first marriage irregular; *Sharpe*, 1843, 1 Broun, 568—second marriage irregular: *Thorburn*, 1844, 2 Broun, 4—second marriage irregular; *Purres*, 1848, J. Shaw, 124—second marriage irregular, but followed by regular ceremony; *Langley*, 1862, 4 Irv. 190—both marriages irregular). Prior to these cases, it had been decided that non-proclamation of banns in the case of a second marriage, duly celebrated by a clergyman, was no defence to a charge of bigamy, and a conviction followed (*M'Lean*, 1836, 1 Swin. 278). It has, however, not been settled whether it is sufficient that a marriage has been constituted by habit and repute, or promise *subsequente copula* (see *Armstrong*, 1844, 2 Broun, 251; *Langley*, *supra*). Hume thinks (i. 461) that if the cohabitation has been long-continued, and of universal repute, this would be sufficient. It is thought that a written acknowledgment of marriage would suffice (Macdonald, 201; *Braid*, 1823, Shaw, 98).

2. *As to the other Qualities of the Marriages.*—(*a*) *The*

first marriage must be lawful.—If the parties are within the forbidden degrees of relationship, the marriage is illegal, and will not support a charge of bigamy. (*b*) *The first marriage must be subsisting at the date of the second marriage.* If decree of divorce has been pronounced before the second marriage has been contracted, this forms a good defence to a charge of bigamy. It is not enough, however, that divorce proceedings have been instituted. If the decree of divorce, founded on in defence, is afterwards set aside, this does not invalidate the defence, unless it has been set aside on the ground of corruption or fraud. It is a good defence if the accused establishes that he had reasonable grounds for believing that the other spouse was dead at the date of the second marriage (*Macdonald*, 1842, 1 Broun, 238). It is probable that an averment that the other spouse is impotent would be held to be a relevant defence to a charge of bigamy (see Hume, i. 461; More, ii. 415; Fraser, *Husband and Wife*, i. 79; Macdonald, 201; *Masterton*, 1837, 1 Swin. 427; Macdonald, 202 and note). (*c*) *The second marriage need not be lawful.*—Thus the charge of bigamy will lie though the second union is an incestuous one.

3. *Art and Part of Bigamy.*—If the second wife (or husband) is aware that the second union is a bigamous one, she (or he) is liable to be punished with the pains of bigamy. So, too, are the priest who performs the marriage ceremony and the witnesses who are present, provided that they have knowledge that the marriage is bigamous.

4. *Indictment for Bigamy.*—The Criminal Procedure Act of 1887 gives this form: "You did, being the lawful husband of Helen Hargreaves, of 20 Teviot Row, Edinburgh, and she being still alive, bigamously marry Dorothy Rose, a widow, of 7 Black's Row, Brechin, and did cohabit with her as her husband . . ."

5. *Proof of Bigamy.*—The prosecutor must prove the first marriage. The proof of this marriage, whether the marriage is regular or irregular, is *prout de jure*, and the best evidence must be adduced. The first wife is an incompetent witness against the husband, but after the first marriage has been established the second wife's evidence is competent. The prosecutor's case is complete, and guilty knowledge on the part of the accused is inferred, after it has been established that a first marriage took place, that the spouse of the accused is still alive, and that a second marriage has been contracted. The *onus* is then upon the panel of showing either that the earlier contract has been dissolved, or that there were, at the date of the second marriage, reasonable grounds for such a belief.

6. *Tribunal.*—If the case presents no serious features, the Sheriff will dispose of it, and, it may be, will do so in his Summary Court. If the circumstances are specially reprehensible, the case will be dealt with in the Court of Justiciary.

7. *Punishment.*—As bigamy is now invariably prosecuted at common law, the punishment is arbitrary, varying, according to the nature of the case, from fine or imprisonment to penal servitude (Hume, i. 459; Alison, i. 535; Macdonald, 200; Anderson, *Crim. Law*, 90).

Law of England.—The law of England with regard to the crime of bigamy, both as to its constitution and the rules of evidence to be followed in proving it, is almost identical with that of Scotland. By the Act 24 & 25 Vict. c. 100, s. 57, it is a felony to commit bigamy, whether the second marriage shall have taken place in England, Ireland, or elsewhere. It is immaterial that the second marriage is within the prohibited degrees of affinity (*Reg.* v. *Allen*, L. R. 1 C. C. R. 367). The punishment of bigamy under the Statute is penal servitude, not exceeding seven years, or imprisonment,

with or without hard labour, for not more than two years. A statutory presumption of death was introduced into the law of England by 9 Geo. IV. c. 31, s. 22, which provides that the pains of bigamy shall not extend to any person whose husband or wife shall have been continually absent for seven years, and not known by such person to be living. This Act further provides that no conviction for bigamy is competent in the case of any person who at the time of the second marriage shall have been divorced from the bond of the first marriage, or in the case of any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction. In England, as in Scotland, it is a good defence to aver and prove that there was reasonable ground for the presumption that the spouse of the first marriage was dead, and this defence is valid even where a second marriage has been contracted within seven years of the prior one (*Reg.* v. *Tolson*, 23 Q. B. D. 168; Stephen's *Com.*, 12th ed., iv. 80).

Bill: Bill for Signet Letters.—"A bill is a petition praying for letters under the king's signet conceived in the same terms" (Beveridge, *Bill Chamber*, 9). In other words, it is the draft of the letters desired by the applicant containing the royal warrant which entitles him to proceed to enforce his rights. According to early practice, it was not considered desirable that the subject should be permitted to set the machinery of the law in motion at his own hand, and without check or control; and it was deemed necessary that he should present an application to the Court and obtain its sanction before obtaining the royal authority, evidenced by the impressing of the signet, to proceed with certain summonses, letters of diligence, and letters of advocation and suspension. The signet letters following on bills bore to proceed *ex deliberatione Dominorum Concilii*: those upon decrees were said to pass *per decretum Dominorum Concilii*. The bills upon which summonses and most forms of letters of diligence proceeded were called "Plack Bills," because of the fee (plack = 4 pennies Scots, or one-third of a penny sterling) which was formerly exigible upon them by the Clerk of the Bills. They very soon came to pass as matter of course, the fiat of the Bill Chamber Clerk, which was endorsed upon them, being the warrant to the Keeper to signet the corresponding letters. It was only in cases of doubt or difficulty, or when the bill was of an unusual character, that it was or is necessary for the Clerk to lay the matter before the Lord Ordinary (53 Geo. III. c. 64, s. 17).

Bills for Summonses.—The summonses for which bills were required were those known as privileged. These were divided, according to Stair (iv. 3. 32), into three classes: (1) those which had no customary style, which ought to be preceded by a bill "that the Lords put not parties to trouble on grounds altogether irrelevant"; (2) those in which the king had an interest; and (3) all summonses in regard to which the ordinary requisites as to time of citation and order of procedure were craved to be modified or dispensed with. These latter constituted by far the largest class of privileged summonses; and, as bills came to pass of course, almost every summons might be brought within the privileged class. To prevent this, the actions falling within the privileged category were from time to time defined by Statute and Act of Sederunt. In other cases bills were unnecessary, and summonses passed the signet as of course (see *Walls' Trs.*, 1888, 15 R. 359). The necessity for a bill as a preliminary to any summons was abolished by the Court of Session Act, 1850 (13 & 14 Vict. c. 36, s. 18).

Bills for Letters of Diligence.—Bills were also required as preliminaries to most forms of diligence, whether in security or for execution, and whether against the person or the property of the debtor. But the simpler forms of procedure introduced by the Personal Diligence Act, 1838 (1 & 2 Vict. c. 114), have for the most part superseded the bill and letters. The old forms are still in general competent; but as the expense of adopting them cannot be recovered (beyond the expense of extract) in cases where the short forms are competent (s. 8), they are but rarely resorted to (see DILIGENCE). It is still necessary, however, to proceed by bill and letters of arrestment or inhibition when it is desired to arrest or inhibit upon the dependence of an action, and the will of the summons contains no warrant for that purpose in terms of the Personal Diligence Act, 1838, s. 16, and the Titles to Land Consolidation (Scotland) Act, 1868, ss. 155, 158, or even, it is thought, when the summons does contain warrant to arrest, but arrestment has not been timeously executed, or the summons has not been timeously called in terms of the Personal Diligence Act, s. 17. For the short form of letters of inhibition now employed, see Titles to Land Consolidation (Scotland) Act, 1868, s. 156, Sched. QQ. Arrestment on the dependence may be loosed upon bill and letters either of special or general loosing, but the usual procedure is by petition to the Court before which the cause depends. Inhibition used on the dependence may also be recalled on petition (Consolidation Act, s. 158). Arrestment in execution may still be loosed upon bill and letters. Arrestment and inhibition in security of a debt not due, upon the ground that the debtor is *vergens ad inopiam*, or putting away his estate, or is *in meditatione fugæ*, still proceeds on bill and letters (*Symington*, 1875, 3 R. 205). Arrestment to found jurisdiction in the Court of Session may proceed upon a precept of arrestment obtained in the Sheriff Court, but the usual procedure is by bill and letters. Where there has been a change of the creditor before a decree has been extracted or a deed registered for execution, or where some subsidiary document forms part of the ground of diligence, it is necessary to proceed by bill and letters of horning in the old form if the debtor is to be charged (see HORNING). The forms of the Personal Diligence Act are not applicable in these last-mentioned cases. Bills are also still required for letters of supplement if these are desired to secure the attendance in the Sheriff Court of a witness out of the jurisdiction (see LETTERS OF SUPPLEMENT), for LETTERS OF OPEN DOORS (*q.v.*), for letters of ejection, which are necessary when decree of removing has been obtained in the Court of Session, and the tenant refuses to remove voluntarily (see EJECTION; REMOVING), and for letters of publication of interdiction (see INTERDICTION). All of these applications are, however, now rare, having been superseded by modern and simpler equivalents.

It may be convenient, however, to append the forms used for bills and letters of arrestment, that being the diligence which most frequently still proceeds in this form (*Juridical Styles*, iii. 302–3). They are applicable, *mutatis mutandis*, to other forms of diligence:—

BILL.

MY LORDS OF COUNCIL AND SESSION, unto your Lordships humbly shows your servitor *A.*, complainer, that [*here narrate verbatim the ground of debt or other warrant for the arrestment, as in the following Letters, changing only "the Books of our Council and Session" into "your Lordships' Books," and "a decree of the Lords thereof" into "a decree of your Lordships," then say*—] as the said bond [*or* bill, registered protest, extract decree, *or* libelled summons, *as the case may be*] here to show will testify:

Herefore the complainer beseeches your Lordships for letters of arrestment at his instance in the premises in common form [*if warrant to arrest in the hands of persons furth of Scotland is wanted*—add—*containing warrant to arrest in the hands of persons furth of Scotland*].

According to Justice, etc.

Y. Z.'s Bill.

The bill does not require to be signed by the writer to the signet, except in the case of bills for loosing arrestments. The bill is presented in the Bill Chamber along with the grounds of debt, and the Bill Chamber Clerk writes upon it, and signs, the following deliverance:—[*Date*].—"*Fiat ut petitur*: Because the Lords have seen the [*grounds of debt*]." The agent then prepares the letters, which may be in the following terms (*Juridical Styles*, iii. 303):—

Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to messengers-at-arms, our sheriffs in that part, conjunctly and severally, specially constituted, greeting. Whereas it is humbly shown to us by our lovite *A.*, complainer, that he by his bill, dated , drawn by him upon and accepted by *B.*, ordered the said acceptor, four months after date, to pay to him or order, within the head office of the Bank of Scotland, Edinburgh, the sum of £ sterling for value received, which bill was endorsed to the said Bank of Scotland by the complainer, and which bill and contents, and interest thereon, are still resting-owing to the complainer *A.*, as the said bill shown to the Lords of our Council and Session has testified; and the said *B.*, knowing that the complainer will suit all manner of diligence against him for payment of the said principal sum and interest thereof, he in defraud and to the hurt and prejudice intends, as the complainer is informed, to uplift, assign, and dispose of his whole moveable goods and gear, debts, and sums of money, and other moveable effects belonging to him, unless remeid be provided thereagainst [Therefore it is necessary that the complainer have these our letters, authorising arrestment to be used in the hands of every person, both within Scotland and furth thereof, who is debtor to or has the effects of the said *B.* in his possession, as is alleged][1].—Our Will is herefore, and we charge you that on sight hereof ye pass, and in our name and authority lawfully fence and arrest all and sundry the said *B.*'s readiest moveable goods, gear, debts, and sums of money, and other moveable effects whatsoever belonging or addebted to him, wherever and in whose hands soever [within Scotland] the same can be found, [and also that ye pass to the office of the Keeper of the Record of Edictal Citations at Edinburgh, in terms of the Statute thereanent, and there, in our name and authority, fence and arrest all and sundry goods and gear, debts and sums of money, and other moveable effects belonging or addebted to the said *B.*, in the hands of any person or persons furth of Scotland]; all to remain under sure fence and arrestment at the complainer's instance, aye and until sufficient caution be found acted in the Books of our Council and Session that the same shall be made forthcoming to the complainer, as accords of law.—According to justice, because the Lords have seen the principal bill above mentioned, as ye will answer to us thereupon; which to do we commit to you and each of you full power by these our letters, delivering them by you duly executed and endorsed again to the bearer.

Given under our signet at Edinburgh, the day of in the [*words*] year of our reign, 18 [*figures*].

Ex deliberatione Dominorum Concilii.

The bill and letters are then taken to the Signet Office, the letters being signeted and returned to the agent, and the bill being retained. The signet letters bear the date of the deliverance on the bill, the date of signeting, if different, being marked on the margin by the Keeper of the Signet.

Bills in Advocations and Suspensions.—Advocation (*q.v.*) of the judgments of inferior Courts required at one time to be instituted by bill and letters, and to pass through the Bill Chamber; but by a series of Statutes, culminating in the Court of Session Act, 1868, ss. 64, 65, and 73, advocation

[1] The three clauses in square brackets will be inserted when warrant to arrest furth of Scotland is required.

was abolished, and appeal substituted in cases where advocation was formerly competent. No procedure now takes place in the Bill Chamber in connection with such appeals. The processes of suspension, suspension and interdict, and suspension and liberation, were also, according to former practice, instituted by bill, followed by the appropriate letters. But by 1 & 2 Vict. c. 86, ss. 4, 5, and 6, procedure by note was substituted for the older form, and the bill and letters were superseded. The note, however, still originates in and passes through the Bill Chamber (see SUSPENSION).

[See Mackay, *Practice*, i. 60–83, *Manual*, 5–16; Beveridge on the *Bill Chamber, passim*: do., *Forms of Process*, 167; Ivory, *Forms of Process*, 86; Stair, iv. 2. 12, iv. 3. 32, iv. 40; *Juridical Styles*, iii. 271 *et seq.*] See BILL CHAMBER: DILIGENCE; ARRESTMENT; INHIBITION; HORNING; POINDING; CHARGE; SINGLE BILLS.

Bill Chamber.—The Bill Chamber is that department of the Supreme Court to which is committed for the most part the exercise of its summary and preventive jurisdiction. As originally constituted, its main function was the passing or refusing the bills formerly necessary as the warrant for certain kinds of summonses and most forms of diligence, but, owing to the abolition of bills as preliminaries to any summons, and to the introduction of simplified forms of diligence, the exercise of this jurisdiction has been greatly curtailed (see BILL). In modern practice, its functions consist (1) in exercising its original jurisdiction as a separate Court; (2) in disposing of certain matters delegated to it by Statute, when it acts as a branch of the Court of Session; and (3) in acting as the Vacation Chamber of the Court of Session.

I. *BILL CHAMBER AS A SEPARATE COURT.*—In this branch of its jurisdiction the Bill Chamber is coeval with the institution of the Court of Session. The chief business then and for long thereafter conducted in it consisted, as already mentioned, in the disposal of bills for summonses and diligences. These in process of time came to pass as of course, the necessary fiat or warrant being endorsed upon them and signed by the Clerk of the Bills. Application was made to the Lord Ordinary only in cases of doubt or difficulty (53 Geo. III. c. 64, s. 17). The same course is still followed when bills are resorted to as the foundation of diligence, the *fiat ut petitur* being endorsed upon them by the Clerk without the intervention of the Lord Ordinary (see BILL). Even when the short forms introduced by the Personal Diligence Act, 1838, are employed, application must still be made in the Bill Chamber when warrant to imprison is desired (s. 6), or where execution is to proceed at the instance of a person acquiring right to the extract (s. 7). The Bill Chamber also acts as a separate Court in exercising in the first instance the preventive jurisdiction of the Court by means of suspension, suspension and liberation, and suspension and interdict. These forms of process were originally instituted by bill, but by 1 & 2 Vict. c. 86, ss. 4, 5, and 6, procedure by note was substituted for the older form. The notes, however, still pass through the Bill Chamber, and the Lord Ordinary on the Bills may sist execution, or order interim liberation or interim interdict, as the case may be, pending the final decision of the cause in the Court of Session. In such cases the charger or respondent has an opportunity of appearing in the Bill Chamber and discussing the competency and the relevancy of the application, and it is only when these are admitted or established by argument that the note is allowed to pass into the Court of Session. The case then becomes for all purposes an

action depending in the Court of Session. When the Lord Ordinary on the Bills passes a note, he may in his discretion grant or refuse the interim remedy sought, and he may order such caution or consignation as the justice of the case may require. [See SUSPENSION.]

II. *SPECIAL STATUTORY JURISDICTION.*—The advantage of having a department of the Court available at all times throughout the year for urgent business, has led the Legislature to devolve upon the Bill Chamber the jurisdiction of the Court of Session in regard to various matters in which despatch is desirable. The most important illustration of this devolution is the jurisdiction conferred upon the Lord Ordinary on the Bills under the Bankruptcy Acts. He may award or refuse or recall sequestration, review the deliverances of the trustee, remove or dismiss him, and he may be appealed to by the bankrupt, the trustee, or the creditors in regard to numerous incidental matters arising in the course of a sequestration. His judgments, where review is not expressly excluded, are subject to the review of the Inner House (see BANKRUPTCY; SEQUESTRATION). Orders of Court in bankruptcy proceedings in England or Ireland may be enforced in Scotland, on being registered in the Bill Chamber (A. S. 21 June 1883). Among the other miscellaneous business which is by Statute thus appropriated to the Lord Ordinary on the Bills, may be mentioned summary applications connected with Admiralty causes (11 Geo. IV. and 1 Will. IV. c. 69, s. 21); appeals against entries in the valuation roll by the Assessor of Railways and Canals (17 & 18 Vict. c. 91, s. 25); appeals against determinations of the Commissioners of Supply on claims to be put on the Commission (19 & 20 Vict. c. 93, s. 6). Applications to register English or Irish judgments under the Judgments Extension Act, 1868, when more than twelve months have elapsed since their date (s. 2). By the Clerks of Session Regulation Act, 1889, s. 3, all summary petitions and applications which, under the Distribution of Business Act, 1857, are appropriated to the Junior Lord Ordinary, are directed to be presented and disposed of in the Bill Chamber, and the processes are entrusted to the custody of the Clerk of the Bills. But these applications are still disposed of during session by the judge in his capacity of Junior Lord Ordinary, not as Lord Ordinary officiating on the Bills. It is only the machinery of the Bill Chamber office that is used for the reception and preservation of the processes. Such applications ought accordingly to be marked both Junior Lord Ordinary and Bill Chamber.

III. *BILL CHAMBER AS VACATION COURT.*—The Bill Chamber as the Vacation Court is also almost coeval with the institution of the Court of Session. An Act of Sederunt passed upon 31 July 1532, at the end of the first session, provides: "It is devisit and ordainit anentis the ordouring of justice and ministratioun thereof, now in this feriate tyme of harvest, in sic matteris as requiris no tabilling, that the Lordis of the Sessioun, as mony as sall happen to remane in this toune for the said tyme, sall sit and minister justice quhen sic materis cumes as requiris hasty acceleratioun and expeditioun; and all the Lordis now present hes given and grantit their power to thaim that sall happen to remane, as saide is, and sall appreve the samin as thai war present." The duty in vacation is now taken by all the judges of the Court in turn, the Lord Justice-General, the Lord Justice-Clerk, and such of the judges as were Lords Commissioners of Justiciary on 16 September 1887, being exempted (53 Geo. III. c. 64, s. 2; 50 & 51 Vict. c. 35, s. 44). The period of duty is generally a fortnight, but is matter of arrangement among the judges themselves. The Lord Ordinary on the Bills in vacation represents the Court of Session in all

business that may then be competently conducted (L. Westbury in *Whitehead & Morton*, 1861, 4 Macq. 294). He may perform the proper Bill Chamber work referred to under heads I. and II. in vacation as well as in session. But in regard to proper Court of Session work his jurisdiction depends partly upon custom and partly upon Statute. By long-established practice he may deal with certain well-defined classes of petitions, such as for appointment of *interim* officers, where the public interest would suffer if the vacancy were not speedily filled up (Beveridge, *Forms of Process*, i. 228); and he may also act in cases where the Court has, before the end of the session, delegated to him the exercise of its *nobile officium* in proceedings requiring despatch (*Greig*, 1866, 4 M. 1103). His statutory jurisdiction in vacation is varied and extensive. He may grant commission and diligence to take evidence to lie *in retentis*, dispose of petitions for recall of arrestment and inhibition, petitions for appointment of oversman under the Companies Clauses Act and the Lands Clauses Act, applications under the Pupils Protection and Entail Acts, applications connected with the appointment and discharge of factors *loco tutoris*, *curators bonis*, and judicial factors, and the granting of special powers to these officers, petitions under the Conjugal Rights Amendment Act, the Trusts Acts, and the Presumption of Life Limitation Act. (For a full list of these Statutes, see Mackay, *Manual*, 14.) In jury causes, the Lord Ordinary on the Bills may dispose during vacation of necessary motions when the judge who is to try the cause is absent (A. S. 16 Feb. 1841, s. 21). He also sits in the Court of Session on the fifth lawful day after each box-day, for the purpose of granting or recalling decrees in absence, hearing and disposing of motions in reference to the preparation of the record, or for granting commission and diligence for the recovery of writings, or to take evidence to lie *in retentis*, or for any other purpose which the Court may specify by Act of Sederunt (31 & 32 Vict. c. 100, s. 93). A roll of undefended causes and motions competent under this section is taken up by the Clerk of the Lord Ordinary on the Bills on the third lawful day following each box-day (*i.e.*, according to present practice, on the Monday following the box-week), between eleven and twelve o'clock, and is printed and published on that day as the roll for the ensuing Wednesday (A. S. 14 Oct. 1868, s. 13). When the Lord Ordinary on the Bills is discharging proper Court of Session work during vacation, he is attended by the Clerk of the Court in which the process depends.

At the institution of this Court, and for some time thereafter, bills came during session before the whole judges assembled; but at least as early as 1610 the duty of disposing of them was delegated to certain of their number, and after 1649 to a single judge, the Lords Ordinary taking the duty in rotation. (For the history of this, see Beveridge, *Bill Chamber*, p. 4.) But by 53 Geo. III. c. 64, s. 2, it was provided that the Junior, or last appointed Lord Ordinary, should, in time of session, officiate exclusively as Lord Ordinary on the Bills, and perform the whole business of the Bill Chamber, and he still does so. Any temporary or casual vacancy may be supplied by the Lord President, under the powers conferred on him by the Court of Session Act, 1868, s. 12. Should a vacancy occur during session, at a time when the Court is not actually sitting, any one of the Lords Ordinary may act as Lord Ordinary on the Bills, on a due statement by the Clerk of the Bills of the urgency of the case (1 & 2 Geo. IV. c. 38, s. 4). The Divisions of the Inner House act as Bill Chamber judges in reclaiming notes from, or on reports by, the Lord Ordinary on the Bills in proper Bill Chamber causes. In suspensions, they simply decide whether and upon what terms the note shall pass into the Court of Session, and their judg-

ments passing or refusing to pass the notes are appealable to the House of Lords (see APPEAL TO HOUSE OF LORDS). Expenses are not given in the Bill Chamber, except when the note is refused: if it is passed, they are left to be dealt with after the issue of the cause in the Court of Session (see EXPENSES: SUSPENSION).

The Bill Chamber office, which is situated in the New Register House, is open all the year round, in vacation as well as in session. In session the hours are from ten to twelve and from two to four: in vacation, from ten to twelve and from two to three. On Saturday the office is not open in the afternoon. Applications are laid before the judge immediately after they are lodged at the office, in cases where an immediate order is desired; and if the matter is very urgent, papers may be taken to the clerk's house, and be by him laid before the judge at any time.

[See Mackay, *Pract.* i. 59 *et seq.*, 364; *Manual*, 5 *et seq.*, 423; Coldstream, *Procedure*, 158, 200; Beveridge, *Bill Chamber: Forms of Process*, 163, 228; Ivory, *Forms of Process*, 81; Shand's *Practice*, 71, 444.]

Bill of Advocation.—See ADVOCATION.

Bill of Exceptions.—When, in the course of the trial by jury of a civil cause, it is considered by either party that the judge gives an erroneous ruling in regard to the admission or rejection of evidence, or lays down erroneous law to the jury for their guidance, the counsel for the party against whom the ruling or direction is given may *except*, *i.e.* object to the ruling or direction, he being bound at the same time to specify that which he maintains ought to be given. The bill of exceptions, which is afterwards prepared in order to obtain the determination of the court of review upon the matter, contains a record of the objection and of the procedure which followed upon it at the trial. The rules of practice with regard to bills of exceptions are to a large extent statutory. By 55 Geo. III. c. 42, which introduced the modern form of jury trial in civil causes into Scotland, it is provided (s. 7):—

"It shall be competent to the counsel for any party at the trial of any issue or issues, to except to the opinion and direction of the judge or judges before whom the same shall be tried, either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial; and on such exception being taken, the same shall be put in writing by the counsel for the party objecting, and signed by the judge or judges: but notwithstanding such exception, the trial shall proceed, and the jury shall give a verdict therein for the pursuer or defender, and assess damages when necessary: and after the trial of every such issue or issues, the judge who presided shall forthwith present the said exception, with the order or interlocutor directing such issue or issues, and a copy of the verdict of the jury indorsed thereon, to the Division by which the said issue or issues were directed: which Division shall thereupon order the said exception to be heard in presence on or before the fourth sederunt day thereafter: and in case the said Division shall allow the said exception, they shall direct another jury to be summoned for the trial of the said issue or issues, or if the exception shall be disallowed, the verdict shall be final and conclusive."

By the A. S., 16 Feb. 1841, s. 32, it is provided:—

"Where the counsel for either party shall except to points of law laid

down by the presiding judge in the course of a trial, or in his charge to the jury, the counsel tendering such exception shall deliver in a note thereof to the judge at the time the exception is taken: and the same, if it shall state correctly what was decided or directed, or omitted by the judge to be directed, shall be certified by the judge at the time, by subscribing his name to such note: and a note of all such exceptions taken in the course of the trial, or to the charge of the judge, shall be finally settled and certified as aforesaid before the jury is enclosed to consider their verdict"; and by the Court of Session Act, 1868, s. 34, it is provided that, "when an exception is taken in the course of a jury trial, a note thereof shall be taken by the judge, or, if he shall so direct, or the party excepting shall think proper, a note thereof shall be written out and signed by such party or his counsel, and also by the judge at the time; and such exception may be made the ground of an application to set aside the verdict, either by motion for a new trial, or by bill of exceptions."

With regard to the form of the bill, the same Statute provides (s. 35):—

"The bill of exceptions (which may be subsequently prepared, and of which notice shall be given as in the case of a motion for a new trial) shall consist of a distinct statement of the exception or exceptions so noted, with such a statement of the circumstances in which the exception or exceptions were taken (including, if necessary, a statement of the purport of the evidence, or extracts therefrom, so far as bearing upon such exception or exceptions, but without any argument), as, along with the record in the cause, may enable the Court to judge of such exception or exceptions; and, unless the party excepting shall choose, or the judge at the trial, or the Court at the discussion of the bill, shall so direct, it shall be unnecessary to print or submit to the Court the notes of evidence or the documentary evidence adduced at the trial: and when such notes and documents are submitted to the Court, they shall form no part of the bill of exceptions; and in discussing a bill of exceptions, it shall be competent for either party to refer to the record, and to every document produced and put in evidence at the trial, and the notes of evidence at the trial may be produced and founded on at any time."

The bill is signed by the presiding judge, and may be signed by him although he has resigned office (*Smith*, 1835, 13 S. 323), or by another judge for him, on remit from the Court, if he has died (*Shepherd*, 1869, 8 M. 31). It is generally prepared, or at least revised, by counsel.—[For a good form, see *Harrison*, 1872, 2 R. 857. See also Macfarlane's *Jury Practice*, 352; *Juridical Styles*, iii. 840.] The bill must state both the ruling or direction complained of, and that which the complainer maintains ought to have been given (*Baird*, 1856, 18 D. 734; *Kyle & Cook*, 1859, 3 Macq. 611). The exception must be to the *law* laid down by the judge. That includes his rulings as to the competency of evidence, the admissibility of witnesses, the sufficiency of the pursuer's evidence to entitle him to have his case submitted to the jury (*Gibson*, 1895, 22 R. 491), and his directions in point of law in charging the jury. Matter of fact cannot be made the subject of exception. If in the course of his charge the judge makes a misstatement of fact, it is the duty of counsel to call his attention to it at the time, and have it corrected by reference to the notes or otherwise. Nor can exception be taken to matters which are within the discretion of the judge, *e.g.* the admission of evidence in replication (*Rankine*, 1873, 1 R. 225). If, however, that discretion is used unjustly or oppressively, or so as to produce a gross miscarriage of justice, the court of review may grant the remedy of a new trial (*Rankine, supra*). The exception ought, as the Statute provides, to be

taken at the time when the ruling or direction complained of is given (*M'Clelland*, 1842, 4 D. 646; *Dobbie*, 1861, 23 D. 1139); nevertheless, under the general power which the Court has to order a new trial on any ground "essential to the justice of the case" (55 Geo. III. c. 42, s. 6), this remedy may be given under special circumstances although the exception was not properly taken (*Woods*, 1886, 13 R. 1118). So far as not validly excepted to, the law laid down by the judge will be assumed to be the whole law applicable to the case, and to be given with the proper qualifications. Refusal to give a proper and necessary direction is a good ground of exception, but parties are not entitled at the close of a judge's charge to call upon him to give additional directions in point of law in the form of abstract propositions (*Hogg*, 1865, 3 M. 1018); nor, when he puts specific questions to the jury which exhaust the case, is he bound to put to them in addition the general question of liability (*Wilson*, 1889, 17 R. 62). In the court of review the direction will be construed as a whole, and not as a series of isolated propositions which, if detached from their context, may be quite misleading (*Tytler*, 1823, 3 Mur. 250).

With regard to exceptions founded upon the undue admission or rejection of evidence, it is provided by 13 & 14 Vict. c. 36, s. 45:—

"A bill of exceptions shall not be allowed in any cause before the Court of Session upon the ground of the undue admission of evidence, if, in the opinion of the Court, the exclusion of such evidence could not have led to a different verdict than that actually pronounced, and it shall not be imperative on the Court to sustain a bill of exceptions, on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived." (See *Cameron*, 1850, 13 D. 412.)

Procedure.—The A. S., 16 Feb. 1841, s. 38, provides:—

"It shall not be competent to proceed to any bill of exceptions, unless such bill shall be lodged within six days after the commencement of the next session, or of the meeting of the Court after the Christmas recess, if the cause has been tried after the end of the session, at the sittings in March or July, or during the Christmas recess, or upon circuit; or within ten days, if the case has been tried during the session, or immediately before the sitting down of the session, or if the exception has been taken on a motion for a new trial, except leave has been obtained from the Court to prolong the period for presenting the bill: And if the party shall have both lodged a bill of exceptions and given notice of a motion for a new trial in the same cause, the Court shall have both before them at the discussion on the bill of exceptions, so that both may be disposed of at the same time, if that shall be deemed expedient or necessary."

The bill is printed, lodged, and boxed to the Division of the Court to which the case belongs, and is sent to the summar roll for discussion (s. 38).

"When a motion for a new trial or bill of exceptions comes before one of the Divisions of the Court, if the judge who tried the cause is not one of the judges of the Division, such judge shall be called in to hear the motion or bill, as the case may be; and when the cause is advised, such judge shall give his judgment with the other judges, and the decision shall be in conformity with the opinion of the majority of the judges present" (Court of Session Act, 1868, s. 58). "No verdict of a jury shall be discharged or set aside upon a motion for a new trial, unless in conformity with the opinion of a majority of the judges of the Division, and in case of equal division

judgment shall be given in conformity with the verdict: but this provision shall not apply to hearings upon bills of exceptions" (s. 61). As to the interpretation of the words "equal division," see *Bickel*, 1893, 20 R. 874.

The judgment of the Division allowing or refusing a bill of exceptions is appealable to the House of Lords (see APPEAL TO HOUSE OF LORDS). See JURY TRIAL; NEW TRIAL.

[See Mackay, *Practice*, ii. 70; *Manual*, 361; Macfarlane, *Jury Practice*, 236, 271.]

Bills of Exchange.—The origin of bills of exchange, which are perhaps the most familiar and important of all our instruments of commerce, is, like many other inventions in daily use, involved in obscurity. Montesquieu (*L'Esprit des Lois*, liv. xxi. c. 20, and note) and others who have followed him attribute the origin of bills to those in whose hands they are still the most formidable of monetary symbols—the Jews, as a method adopted by them for recovering their effects which they had left behind when driven from France by Philip II., and again by Philip V. Others of no less authority assert that bills were first introduced by the Florentines in the twelfth, and by the Venetians about the thirteenth, century. Whoever many have had the honour of introducing bills of exchange, there seems to be no doubt of this, that they originated from the necessities of foreign trade, and the difficulty of transmitting coin from one country to another. With the development of commerce, the use of these most convenient instruments of commercial traffic naturally increased; and while at first their use was confined entirely to bills between merchants in this country and foreigners, it was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.

There is no precise record when bills were first introduced into Scotland, but it is clear they must have been in use for some time prior to 1681. In that year the Act of the Third Parliament of Charles II. chap. xx. was passed, providing for summary diligence upon foreign bills "for the whole sums contained in the bills as well exchange as principal in forme as effeirs sicklike and in the same manner as upon registrat bonds or decreets of registration proceeding upon consent of parties." The provisions of this Act were extended in 1696 to inland bills by an Act of the First Parliament of King William, chap. xxxvi.

The law relating to bills of exchange, cheques, and promissory notes is now mainly regulated by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which also repeals and re-enacts, with certain modifications, the provisions of the various Statutes relating to these documents. Although the title of the Act is "An Act to codify the Law relating to Bills of Exchange, Cheques, and Promissory Notes," it must not be assumed that the Act is merely a code of the law existing at the time of its passing. It was intended to alter, and did alter, the law in various respects. A single instance may here be noticed. Prior to the Act, a bill could not be made payable in the alternative to one of two or some of several payees (*Thomson*, 1867, 5 M. 344). Now, this may be done (s. 7 (2)). While certain changes have been made, the Act expressly provides (s. 97 (2)) that the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, continue in force, and receive effect in the determination of questions affecting these documents. The "law merchant" is simply the usages of merchants and traders in the different departments of commerce ratified by the decisions of courts of

law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience. The "law merchant" is not a fixed body of law, but is capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. "When a general usage has been judicially ascertained and established," said Lord Campbell in *Brandao* (12 Cl. & F. at p. 805), "it becomes a part of the law merchant which courts of justice are bound to know and recognise."

In determining questions regarding bills, the language of the Statute must receive its natural meaning, uninfluenced by any consideration derived from the previous state of the law. Except in the cases where special provision is made that the law existing at the time of the passing of the Act is to continue, an appeal to earlier decisions can only be justified on some special ground. The Stamp Act and some minor enactments are declared not to be affected by the Act (s. 97 (3)), and the law relating to summary diligence, prescription, and bankruptcy is not interfered with.

It is proposed to consider the Act, so far as relating to bills, in the under-mentioned order, the numbers in black type in the text referring to the sections of the Act, those in ordinary type to the corresponding sub-sections. Thereafter the "Privileges of Bills" and "Stamp Duties" will be noticed:—

1. Interpretation of Terms.
2. Forms referred to in the Text.
3. Definition and Essentials of a Bill.
4. Capacity and Authority of Parties.
5. The Consideration of a Bill.
6. Negotiation of Bills.
7. Rights and Duties of Holder.
8. Liability of Parties.
9. Discharge of a Bill.
10. Acceptance and Payment for Honour.
11. Lost Instruments.
12. Bills in a Set.
13. Miscellaneous.
14. Bills for Sums of Less than Twenty Shillings.
15. Privileges of Bills.
16. Stamp Duties.

1. Interpretation of Terms.

Interpretation of Terms.—**2.** "Acceptance" means an acceptance completed by delivery or notification. "Action" includes counter-claim and set-off. In Scotland, compensation. Lodging a claim in a multiplepoinding is equivalent to an action. "Banker" includes a body of persons, whether incorporated or not, who carry on the business of banking (see Bank; Banker). "Bankrupt" includes any person whose estate is vested in a trustee or assignee under the law for the time being in force relating to bankruptcy. "Bearer" means the person in possession of a bill which is payable to bearer. "Bill" means a bill of exchange. "Delivery" means transfer of possession, actual or constructive, from one person to another. "Holder" means the payee or endorsee of a bill who is in possession of it, or the bearer thereof. "Endorsement" means an endorsement completed by delivery. "Issue" means the first delivery of a bill, complete in form, to a person who takes it as a holder. "Person" includes a body of persons, whether incorporated or not. "Value" means valuable consideration (s. 27).

"WRITTEN" includes printed, and "WRITING" includes print. A bill may be expressed on paper by ink, pencil, lithography, engraving, or other like means, and in any language, English or foreign (*In re Marseilles Company*, 1885, L. R. 30 Ch. Div. 598).

2. FORMS REFERRED TO IN THE TEXT.

Forms of Bills.—The following are certain forms of bills in daily use, but it is to be observed that there is no statutory form of a bill:—

1. *Inland Bill.*

£50. [*Place and Date.*]

One month after date pay to me or my order the sum of fifty pounds, value received.

Peter Jones, JOHN SMITH.
[*Address*]. PETER JONES.

2. *Foreign Bill.*

£50. [*Place and Date*].

One month after sight of this first of exchange (second and third unpaid), pay to the order of fifty pounds, for value received, and charge the same to account of , against your letter of credit No. 2.

PETER SMITH.

William Walker, WILLIAM WALKER.
[*Address.*]

3. *Bill Payable by Instalments.*

£50. [*Place and Date.*]

By equal instalments, at three, six, and nine months after date, pay to me or my order, within the Bank here, the sum of fifty pounds, value received.

Peter Jones, JOHN SMITH.
[*Address.*] PETER JONES.

4. *Bill having two or more Acceptors.*

£50. [*Place and Date.*]

Conjunctly and severally, three months after date, pay to me or my order, within the Bank here, the sum of fifty pounds, value received.

Peter Jones, JOHN SMITH.
[*Address.*] PETER JONES.
Andrew Smyth, ANDREW SMYTH.
[*Address.*]

5. *Bills in a Set.*

£50. [*Place and Date.*]

At usance [*or* at two or more usances] pay this, my first Bill of Exchange (second and third of the same tenor and date not paid), to Andrew Smyth or his order, within the Bank, fifty pounds sterling at the current exchange, value received from him, and place the same to account as per advice [*or* without advice from].

William Walker, PETER SMITH.
[*Address.*] WILLIAM WALKER.

NOTICE OF DISHONOUR OF BILL.

1. *To Drawer.*

To . . . . . [*Place and Date*].

Take notice that a Bill for £ , drawn by you under date the , on , and payable at , has been dishonoured by non-payment [*or* non-acceptance] [*in the case of a foreign Bill, add "and protested" if it have been noted or protested*], and that you are held responsible therefor.

(Signed) . . . . . .

2. *To Endorser.*

Take notice that a Bill for £ , drawn by , under date the , on , and payable at , and which bears your endorsement, has been dishonoured by non-acceptance [*or* non-payment] [*in the case of a foreign Bill, add "and protested" if it have been noted or protested*], and that you are held responsible therefor.

(Signed) . . . . . .

3. *To Drawer of Partial Acceptance.*

Take notice that a Bill for £ , drawn by you under date the , on , has been accepted by him for £ only, and that you are held responsible for the balance and expenses.

(Signed) . . . . . .

PROTEST OF BILL OR PROMISSORY NOTE FOR NON-PAYMENT OR NON-ACCEPTANCE.

Rules as to Presentment, s. 45.
Place of Protest, s. 51.
Contents of Protest, s. 51.
Stamp Duty on Protest, s. 51.
Requisites of Protest (*Bartsch*, 1895, 23 R. 328).

[*Here copy the Bill or Promissory Note protested.*]

On the day of , in the year of our Lord One thousand eight hundred and ninety , I., *A. B.*, of the city of , in the county of , in that part of the United Kingdom called Scotland, Notary Public, by royal authority duly admitted, allowed, and sworn, at the request of , the holder of a certain original Bill of Exchange [*or* Promissory Note], a copy of which is above written, did, at [*proceed to*], the place of payment specified in the said Bill of Exchange [*or* Promissory Note];

or,

a. The address of the drawee [*or* acceptor] of the said Bill of Exchange [*or* maker of the said Promissory Note];
b. The place of business of the drawee [*or* acceptor] of the said Bill of Exchange [*or* maker of the said Promissory Note];
c. The ordinary residence of the drawee [*or* acceptor] of the said Bill of Exchange [*or* maker of the said Promissory Note], because his [*her, their*] place of business was not known [*or* because he has [have] no place of business];
d. The place where the drawee [*or* acceptor] of the said Bill of Exchange [*or* maker of the said Promissory Note] was found;
e. The last-known place of business [*or* residence] of the drawee [*or* acceptor] of said Bill of Exchange [*or* maker of the said Promissory Note],

demand payment [*or* acceptance] of the said Bill of Exchange [*or* Promissory Note] from , to which demand he made answer;

or,

and, after the exercise of reasonable diligence, no person authorised to pay or refuse payment [*or* acceptance] of the said Bill of Exchange [*or* Promissory Note] could be found there;

Wherefore I, at request foresaid, did at said place, and on said date, duly protest, and do hereby protest, the said Bill of Exchange [*or* Promissory Note] as well against the drawer [*or* acceptor *or* maker], *and endorsers thereof*, and as against all others whom it doth or may concern, jointly and severally, *for non-payment of the contents, and* for [*exchange, re-exchange*], interest, damages, and expenses [*or* for non-acceptance], as accords, before and in presence of ,
witnesses specially called to the premises.

ACT OF HONOUR.

Thereafter, the same day, in presence of me, Notary Public, appeared *H. F.*, merchant in Glasgow, who offered to pay the contents of said Bill to the said *X. Y.*, the holder thereof, for honour and on account of *J. K.*, endorser [*or* as the case may be]; and having paid the same accordingly, he protested that said drawer [and acceptors, *if the bill has been accepted*] and endorsers, prior to the said *X. Y.* and the said *J. K.*, should remain liable, jointly and severally, to him, in like manner as they had been to the said holder. In presence of, etc., as above.

FORM OF PROTEST TO BE USED WHEN THE SERVICES OF A NOTARY CANNOT BE OBTAINED.

Know all men that I., *A. B.*, householder of , in the county of , in the United Kingdom, at the request of *C. D.*, there being no Notary Public available, did on the day of 189 , at , demand payment [*or* acceptance] of the Bill of Exchange hereunder written from *E. F.*, to which demand he made

answer [*state answer, if any*]; wherefore I now, in the presence of *G. H.* and *J. K.*, do protest the said Bill of Exchange.

(Signed) *A. B.*

G. H. } witnesses.
J. K. }

N.B.—A copy of the Bill itself, with its endorsations, should be annexed.

Protest of Bill left for Acceptance, but Delivery refused, where Bill one of a Set.

[*Copy Bill and Endorsations.*]

At Glasgow, in the county of Lanark, in that part of the United Kingdom of Great Britain and Ireland called Scotland, on the day of , in the year of our Lord One thousand eight hundred and , at the request made to me by or on behalf of *A. B. & Co.*, bankers, London, the holders of the second Bill of Exchange, of which the above is a true copy, I, , Notary Public, by royal authority duly admitted, allowed, and sworn, presented the second Bill of Exchange at the place of business, No. 10 St. Vincent Place, Glasgow, of the above-named *C. D. & Co.*, merchants there, and demanded delivery of the first of exchange of said Bill, which first of exchange had previously been sent to them for their acceptance, when I received for answer that the said first of exchange could not be delivered up [*here state answer given*].

Therefore I, the said Notary Public, at the request aforesaid, protested, as I do hereby protest, the said Bill of Exchange, not only against the above-named and designed *C. D. & Co.*, for want of delivery of the first of exchange thereof, but also against the above-named drawers and endorsers thereof for recourse, and against all concerned, for all exchange, re-exchange, interest, costs, damages, and expenses suffered, or to be suffered, for want of delivery of the said first of exchange, and for remedy at law.

Thus done and protested at Glasgow aforesaid, before and in presence of *A. B.* & *C. D.*, witnesses to the premises, specially called and required.

Form of Protest for Non-Delivery, where there is only one Copy of Bill.

At , in the county of , in that part of the United Kingdom of Great Britain and Ireland called Scotland, on the day of , in the year , before me , Notary Public, by royal authority duly admitted, allowed, and sworn, appeared , who declared that on the day of , he left for acceptance, agreeably to usage and custom, with , a Bill of Exchange dated the day of drawn by , on the said , for the sum of , and that the said had repeatedly sent to get back the said Bill, accepted or unaccepted, but without success; wherefore he required me to demand delivery thereof, accepted or unaccepted, and, in default, to protest in conformity; whereupon I passed to the place of business of the said and demanded delivery thereof, when I received for answer [*here state answer*].—Wherefore I, the said Notary Public, at the request aforesaid, have protested, etc., etc., as in preceding form.

Protest in Case of Need.

[*Copy Bill and Endorsations, including the Reference, in Case of Need.*]

At Glasgow, in the county of Lanark, in that part of the United Kingdom of Great Britain and Ireland called Scotland, on the day of , in the year of our Lord One thousand eight hundred and , at the request made to me by or on behalf of , the of the original Bill of Exchange, of which the above is a true copy, I, , Notary Public, by royal authority duly admitted, allowed, and sworn, presented the said Bill of Exchange at the place of business, No. 15 Argyle Street, Glasgow, of the above-named *A. B. & Co.*, fruit merchants there, upon whom the same is drawn, and demanded acceptance thereof, when I received for answer that the same could not be accepted; thereafter I presented the said Bill of Exchange at the Bank of Scotland, St. Vincent Place, Glasgow, in terms of the reference in case of need on said Bill of Exchange, and demanded acceptance, when I received for answer that the same could not be accepted.

Therefore I, the said Notary Public, at the request aforesaid, protested, as I do hereby protest, the said Bill of Exchange, not only against the above-named and designed *A. B. & Co.* for want of acceptance thereof, but also against the above-named drawers and endorsers thereof for recourse, and against all concerned, for all exchange, re-exchange, interest, costs, damages, and expenses suffered or to be suffered, for want of acceptance of the said Bill of Exchange, and for remedy at law.

Thus done and protested at Glasgow aforesaid, before and in presence of

witnesses to the premises, specially called and required.

Note.—A Bill presented to a referee in case of need, must be accompanied by a protest against the drawee or acceptor, as the case may be.

3. Definition and Essentials of a Bill.

3. *Definition and Essentials.*—(1) A bill is an unconditional order in writing addressed by one person (who is called the drawer) to another (who is called the drawee, and, after signing the bill, the acceptor), signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person (s. 7 (1)), or to bearer. (2) An instrument which does not comply with these conditions is not a bill of exchange. (3) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or a statement of the transaction which gave rise to the bill, is unconditional (Re *Boyse*, 1886, 33 Ch. Div. 612). A bill complies with the provisions of the Act although it be not holograph of the drawer, provided it is signed by him or by some other person by or under his authority (s. 91 (1)). The initials of the drawer are sufficient, providing initialling be his usual mode of subscription. A bill may also be signed by a notary public and two witnesses on behalf of any person, whether drawer, acceptor, or endorser. The order to pay expressed in the bill must be unconditional, that is, it must be a demand or request made as a right and not as a favour (*Hamilton*, 1849, 18 L. J. Ex. 393; 4 Exch. 200). A writing which, when issued, does not contain the essential elements of a bill, may yet be capable of being made a bill (ss. 18, 20), and, in any case, of being enforced as a document of debt, though not entitled to the privileges of a bill. (4) A bill is not invalid by reason (*a*) that it is not dated. The holder may insert the true date (s. 12); (*b*) that it does not specify the value given, or that any value has been given therefor (s. 27); (*c*) that it does not specify the place where it is drawn or the place where it is payable. Parole evidence is competent where it is necessary to prove the consideration, place of drawing or payment (s. 100). An alternative place of payment may be inserted.

4. *Inland and Foreign Bills.*—An inland bill is one which is, or, on the face of it, purports to be, both drawn and payable within the British Isles, even though it be actually accepted abroad or accepted payable abroad (s. 72 (2)), or drawn within the British Isles upon some person resident therein. Any other bill is a foreign bill. For the purposes of the Statute the "British Isles" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to them being part of the dominions of Her Majesty. A bill (though *de facto* a foreign bill) which does not expressly appear to be a foreign bill may be treated either as an inland or foreign bill, in the option of the holder (*Lebel*, 1867, L. R. 3 Q. B. 77).

5. *Effect where different Parties to Bill are the same Person.*—(1) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of, the drawee. A bill payable to the drawee may be negotiated by him either before or after acceptance; but when the acceptor of the bill is or becomes the holder of it at or after its maturity in his own right, the bill is discharged, and therefore cannot be negotiated

(s. 61). (2) Where in a bill the drawer and drawee are the same person, as in the case of a person drawing a bill in his own name on a firm of which he is the sole partner, or where the drawee is a fictitious person or a person not having capacity to contract (ss. 22, 41 (2), 46 (2), and 50 (2)), the holder (s. 2) may treat the instrument, at his option, either as a bill or promissory note (*Williams*, 1877, L. R. 3 App. Ca. 133).

6. *The Drawee.*—(1) The drawee must be named or otherwise indicated in a bill with reasonable certainty. The mere acceptance of a bill does not supply the want of a named drawee, but it is competent for any person in possession of the bill to fill in the name of the drawee (s. 20). (2) A bill may be addressed to two or more drawees, whether they are partners or not; but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill. The name of a referee, in case of need, may be inserted without invalidating the bill (s. 15).

7. *The Payee.*—(1) Where a bill is not payable to bearer, the payee must be named, or otherwise indicated therein with reasonable certainty. The indication must be in the bill itself, and not in a separate writing. A bill which, when issued, does not contain the payee's name, may, if a space have been left for the purpose, be converted into a bill by the person in possession filling in a name (s. 20). A bill made payable to ". . . order," the blank never having been filled in must be construed as payable to "my order," that is, to the order of the drawer, and is, when endorsed by him, a valid bill (*Chamberlain*, 1893, 2 Q. B. (C. A.) 206. (2) A bill may be made payable to two or more payees jointly, or it may be made payable, in the alternative, to one of two or one or some of several payees, or to the holder of an office for the time being. In this last case summary diligence would be incompetent (ss. 98, along with *Fraser*, 1853, 15 D. 756). (3) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer. The effect of this subsection is that a bill may be treated as payable to bearer where the person named as payee, and to whose order the bill is made payable on the face of it, is a real person, but has not, and never was intended by the drawer to have, any right upon it, or arising out of it; and this is so though the bill (so called) is not in reality a bill, but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the document for payment, both the named drawer and the named payee being entirely ignorant of the circumstances (*Bank of England*, L. R. 22, Q. B. D. 103; C. A. 23 Q. B. D. 243; H. of L. 1891, A. C. 107). A bill within the subsection may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer, except in the case of one who is a party to, or who has notice of, a fraud (*Bank of England*, *supra*; H. of L. report, per L. Herschell, at p. 154).

8. *What Bills are Negotiable.*—(1) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable. Thus a bill payable to *A. B.* only, or to *A. B.* for my use, is not negotiable. (2) A negotiable bill may be payable either to order or to bearer. (3) It is payable to bearer if it is expressed to be so payable (and even if it contain, in addition, the name of a payee, which may therefore be disregarded), or if the only or last endorsement be an endorsement in blank (even if such endorsement be preceded by a special endorsement, which may therefore be cancelled (s. 34)). (4) A bill is payable to order which is expressed to

be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable. (5) Where a bill, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order, at his option.

9. *Sum Payable.—Interest.*—(1) The sum payable by a bill is a sum certain within the meaning of the Act, although it is required to be paid (*a*) with interest. In the case of inland bills, where no rate is specified, but the word "interest" only appears, or where legal interest is stipulated for, interest at five per cent. is implied. For bills payable in a foreign country a higher rate will be allowed, where, by the law of such country, such higher rate is held to be meant by legal interest. Since the repeal of the Usury Laws (17 & 18 Vict. c. 90, s. 1), there is no limit to the rate which parties may agree upon (but see, in case of money-lenders, *Young*, 23 Jan. 1896, 33 S. L. R. 311). The rate of interest must, however, be "certain" and ascertainable from the terms of the bill itself (*Morgan*, 1866, 4 M. 321; *Tennent*, 1878, 5 R. 435; *Vallance*, 1879, 6 R. 1099); (*b*) by stated instalments (for form of instalment-bill, see *supra*); (*c*) by stated instalments, with a provision that, upon default in payment of any instalment, the whole shall become due. Days of grace (s. 14) must be added to the dates on which the instalments are payable; (*d*) according to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill. Where no rate is indicated, the amount payable is calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (s. 72 (4)). (2) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable. The figures may be looked at to explain an ambiguity in the amount as written (*Gordon*, 1848, 10 D. 1129). A drawer who leaves a blank for the words while filling in the sum in figures, may, on account of his negligence, be liable to the holder (s. 2) for the amount written in the vacant space, though generally he may prove by parole (s. 100) that the bill as issued did not contain the amount in words, the insertion of which, consequently, amounts to an unauthorised alteration (s. 64). (3) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated, from the issue thereof. If the bill has been issued either antedated or post-dated, interest runs from the date it bears (s. 13 (2)). Where there is no stipulation as to interest, interest is payable at five per cent. from the due date of the bill. Where an acceptor of a bill dies during its currency, his executor must pay the bill, with interest from the date when it fell due, notwithstanding the fact that he has six months within which to make payment of the deceased's debts. See EXECUTOR.

10. *Time of Payment.—Bills Payable on Demand.*—(1) A bill is payable on demand (*a*) which is expressed to be payable on demand, or at sight, or on presentation; or (*b*) in which no time for payment is expressed. If a demand-bill is post-dated, payment cannot be demanded until after the date it bears (*Gatty*, 1877, L. R. 2 Ex. Div. 265). There are no days of grace on such bills. Presentment for payment must be made on a business day (ss. 45 (3) and 92). (2) Where a bill is accepted or endorsed when it is overdue (that is, in the case of all bills not payable on demand on the expiry of the last day of grace (s. 14)), it is, as regards the acceptor who so accepts or any endorser who indorses it, deemed to be payable on demand

(ss. 45 and 54). This does not, however, make the bill a bill payable on demand, requiring an additional stamp, within the meaning of the Stamp Act (s. 97 (3)).

11. *Bills Payable at a Future Time.*—A bill is payable at a determinable future time which is expressed to be payable (1) at a fixed period after date or sight; (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect. Thus a bill payable "when I am in good circumstances," is not a bill, though it is not necessarily invalid as an obligation to pay a sum of money.

12. *Omission of Date in Bill Payable after Date.*—Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder (s. 2) may insert therein the true date of issue or acceptance (ss. 2 and 17), and the bill is payable accordingly. Provided that (1) where the holder in good faith (s. 90) and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course (s. 29), the bill is not avoided thereby, but operates and is payable as if the date so inserted had been the true date. This section seems to limit the effect of sec. 20.

13. *Antedating and Post-Dating.*—(1) Where a bill or an acceptance, or any endorsement on a bill, is dated, the date shall, unless the contrary be proved (s. 100), be deemed to be the true date (s. 21) of the drawing, acceptance, or endorsement, as the case may be. An undated endorsement is presumed to have been made as of the date of the bill, or at least during the currency thereof (s. 36 (4)). (2) A bill is not invalid by reason only that it is antedated or post-dated, or that it bears date on a Sunday.

14. *Computation of Time of Payment.—Days of Grace.*—Where a bill is not payable on demand (s. 10), the day on which it falls due is determined as follows:—Three days, called days of grace, are in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace. Where payment of a bill is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonour to the drawer and the endorsers, has no right of action against either the acceptor or the other parties to the bill until the expiration of that day. Accordingly, an action brought by the holder of a bill against the acceptor on the last day of grace was dismissed as premature (*Kennedy*, 4 July 1894, 2 Q. B. (C. A.) 759).

Bills falling due on Sunday, Christmas Day, Holidays, etc.—When the last day of grace falls on a Sunday, Christmas Day, Good Friday, or a day appointed by Royal Proclamation as a public fast or thanksgiving day, the bill is, except in the case after mentioned, due and payable on the preceding business day. When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it [the bank holidays in **England** are: Easter Monday, the Monday in Whitsun week, the first Monday in August, the twenty-sixth day of December, and when the last date falls on a Sunday, then the Monday following. In **Scotland** the bank holidays are: New Year's Day, Christmas Day (if either of these days fall on a Sunday, then the next following Monday), Good Friday, the first Monday of May, and the first Monday of August], or when the last day of grace is

a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day. In cases where the last day of grace falls on Christmas Day, and that day is a Sunday, Monday being a holiday, bills are due and payable on Tuesday (Bank Holidays Act, 1871, s. 1). As bank holidays differ in different countries, the due date of a bill is determined according to the law of the place where it is payable (B. of E. Act, s. 72 (5)).

Computation of Time.—Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time of payment is to begin to run, and by including the day of payment. Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or from the date of non-delivery if the acceptor, who may retain the bill for the customary period before accepting or refusing to accept, refuses delivery. The usual time for which a bill is left for acceptance is twenty-four hours, but the custom is not universal. The time within which a bill left for acceptance should be accepted, depends on the custom of the place of presentment (s. 42; and *Bank of Van Diemen's Land*, L. R. 3 P. C. 526).

Interpretation of word "Month" in a Bill.—The term month in a bill means calendar month. Thus a bill drawn payable one month after the 28th, 29th, 30th, or 31st January, is due on the 3rd of March, except in leap years, when a bill dated 28th January, and drawn payable one month after date, is due on the 2nd of March.

Bills drawn Payable at one or more Usances.—Foreign bills are occasionally drawn payable at one or more usances. By "usance" is meant the customary time at which bills are made payable in a particular country. The length of the usance varies in different places from fourteen days to one, two, or even three months. Double, treble, and half usance are terms implying corresponding alterations on the usual period.

15. *Referee in Case of Need.*—The drawer of a bill and any endorser may insert therein the name of a person to whom the holder may resort in case of need; that is to say, in case the bill is dishonoured by non-acceptance (s. 43) or non-payment (s. 47). Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need, or not, as he may think fit. The usual form of a reference in case of need, which is written under the drawee's address, is: "In case of need apply to *A. B.* for *C. D.*," or "in case of need apply to at ." There is, however, no statutory form of words; and provided it is clear that the referee is to be resorted to only in case of need, and that he is not drawn upon alternatively or in succession to the drawees, any form of words is sufficient.

Position of Referee.—A reference in case of need constitutes the referee agent for the drawer or endorser for payment only, and not agent for notice of dishonour generally. Hence notice to him of dishonour by the acceptor is not notice to the drawer or endorsers (*In re Leeds Banking Co.*, L. R. 1 Eq. 1). (For the rights and liabilities of a referee who accepts or pays, *see* ss. 65–8.)

16. *Optional Stipulations by Drawer or Endorser.—Limitation of Liability.*—The drawer of a bill and any endorser may insert therein an express stipulation (1) negativing or limiting his own liability (s. 55) to the holder, (2) waiving, as regards himself, some or all of the holder's duties (ss. 39–52). The addition of the words "pay *D.* or order without recourse

to me" to the signature of a drawer or endorser, while limiting such drawer's or endorser's liability, leaves the holder free to have recourse to any other party to the bill whose liability is not so limited. A person who endorses a bill "without recourse" is in the position of a transferror by delivery (s. 58). The fact of the drawer or endorser waiving any of the holder's duties, such as presentment for payment, giving notice of dishonour and protesting, while relieving any subsequent holder of the necessity of performing the duty waived in order to preserve recourse against that particular drawer or endorser, still leaves the performance of that duty necessary in order to preserve recourse against the other parties liable on the bill, whether prior or subsequent to the party waiving. The person who has waived any such duty remains liable on the bill, and he is entitled to give notice of dishonour to the parties liable on the bill prior to him, though he has not received such notice himself (s. 49 (1)).

17. *Definition and Requisites of Acceptance.*—(1) The acceptance (s. 2) of a bill is the signification by the drawee of his assent to the order of the drawer. "Save in the case of acceptances for honour or per procuration (ss. 15 and 65), or in the cases provided for in the Companies Act, 1862, s. 47, by which any person acting under the authority of a company may accept or endorse bills on behalf of the company without incurring personal responsibility, and even then only where such companies have power conferred on them to issue bills or notes, no one can become a party to a bill *qua* acceptor who is not a proper drawee, or, in other words, an addressee" (*Walker's Trs.*, 1880, 7 R. (H. L.) 85; L. R. 5 App. Ca. 754). Thus, where a bill is addressed to *B.*, and *C.* accepts it, *C.* is not liable as an acceptor; and where a bill is addressed to *B.*, and he accepts, and *C.* also writes an acceptance on it, *C.* is not liable as an acceptor. Where a bill addressed to *B.* & *Co.* is accepted in the firm's name by *C.*, a partner who adds his own name, the acceptance is that of the firm and not of C. (*Barnard*, 1886, L. R. 32 Ch. Div. 447). (2) An acceptance is invalid unless it complies with the following conditions, namely:—(*a*) It must be written on the bill (or on one bill of a set (s. 71 (4)), and be signed by the drawee. The mere signature of the drawee, without additional words, is sufficient. The word "accepted" need not appear on the bill, though this is usual. All that is requisite is the signature (as to signature, see under s. 3) of the addressee, which may either be on the face of the bill or on the back (*Walker's Trs., supra*). The word "accepted," without the signature of the addressee, is not sufficient. The signature of the acceptor may be adhibited by himself or under his authority (s. 91 (1)). If a corporation be the acceptor, the corporate seal may be adhibited (s. 91 (2)). With regard to a bill accepted abroad, the validity of such acceptance in point of form is determined by the law of the place where the acceptance is made (see *infra*, INTERNATIONAL LAW, *Bills of Exchange*). (*b*) It must not express that the drawee will perform his promise by any other means than the payment of money. Where the bill is payable after sight, it is proper that the date of acceptance be added; but if this is not done, the date may be inserted by the holder (s. 12).

18. *Time for Acceptance.*—A bill may be accepted (1) before it has been signed by the drawer, or while otherwise incomplete (s. 20; and *London and South-Western Bank*, 1880, L. R. 5 Ex. Div. 96). The drawer may sign his name even after the acceptor's death (*Carter*, L. R. 25 Ch. Div. 666). There is no presumption as to the exact time of acceptance (*Roberts*, 1852, 12 C. B. 778). (2) When it is overdue (ss. 14 and 45 (1, 2)), or after it has been dishonoured by a previous refusal to accept (ss. 42, 43), or by non-payment

(s. 47). (3) When a bill payable after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment for acceptance. If, on accepting at the second presentment, the drawee neglect to fill in the date, the holder may fill in the date of the first presentment as that of the acceptance (s. 12). Where the addressee does not accept a bill payable after sight, and the holder does not give notice of dishonour to the drawer and endorsers in the event of the bill being accepted on a second presentation as of that date and not of the first date of presentation, the drawer and endorsers are discharged unless they consent to the bill being accepted as of the date of its second presentment.

19. *General and Qualified Acceptances.*—(1) An acceptance is either general or qualified. (2) A general acceptance assents without qualification to the order of the drawer. This binds the acceptor to pay the sum for which the bill is drawn to the person named in the bill and his endorsers at the date and place stated in the bill; or if no place be stated, then at the place of business or residence of the drawee. A qualified acceptance in express terms varies the effect of the bill as drawn. If the acceptor desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not, if he acted reasonably, fail to understand that it was accepted subject to an expressed qualification (*Meyer & Co.*, 1891, A. C. 520). The acceptance cannot vary the effect of the bill by promising the performance of anything but the payment of money (s. 17), nor must it engage to pay a larger sum than that for which the bill was drawn (Stamp Act, 1891 (54 & 55 Vict. c. 39)). The holder of a bill may refuse to take a qualified acceptance, and may treat the bill as dishonoured by non-acceptance. (As to position of drawer and endorsers in the event of a qualified acceptance being taken, *see* s. 44.) A verbal qualification cannot be proved, because it is expressly required that an acceptance shall be in writing, but the mere addition of the words "as cautioner" is not a qualification of the acceptor's engagement to pay (*Walker's Trs., supra*). In particular, an acceptance is qualified which is (*a*) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated. Summary diligence is incompetent on such an acceptance, as the fulfilment of the condition must be a matter of proof; (*b*) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn. Such an acceptance, unlike one that is otherwise qualified, may be taken by the holder without the assent of the drawer and prior endorsers, though, to preserve recourse against them, the holder must give them notice of the fact (s. 44); (*c*) local, that is to say, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only, and not elsewhere; (*d*) qualified as to time, as where a bill is drawn one month after date, but is accepted payable six months after date; (*e*) the acceptance of some one or more of the drawees, but not of all. But the acceptance of one drawee for himself and any others will bind those for whom he signs, if he have their implied or express authority to do so.

20. *Inchoate Bills.*—(1) Where a simple signature on a blank stamped paper—that is, on paper bearing an impressed stamp specially appropriated to bills and notes, but not to a signature on paper stamped with a different stamp, or to a signature on paper bearing an adhesive stamp—is delivered by the signer in order that it may be converted into a bill, it operates as

primâ facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an endorser. In like manner, when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill up the omission in any way he thinks fit. It is essential that the stamped paper have been actually delivered for the purpose of being converted into a bill. If it can be proved that it was delivered for any other purpose, or if, instead of being delivered, it has been found or stolen and filled up, and endorsed by a finder or a thief even for value to a *bonâ fide* holder, the person who originally signed the blank paper, afterwards filled up without his consent, express or implied, will not be liable (*Baxendale*, 1878, L. R. 3 Q. B. D. at p. 531). A person who has merely signed a stamped bill paper may be barred by negligence from setting up the defence that he did not deliver the stamped paper with the signature thereon for the purpose of being made a bill, but such negligence must amount to the actual neglect of a duty on his part (*Baxendale, supra*, at p. 532). The signature on the bill is in the first place proof of the holder's authority to fill it up as a complete bill, but the person who signed the blank stamped paper may prove by parole evidence that the bill has not been filled up in accordance with his instructions (sec. 100). The mere fact that a person accepts a bill drawn on a stamp of higher value than it need bear, which, after acceptance, is fraudulently altered so as to cover a much larger sum, is no bar to the acceptor setting up the subsequent alteration of the bill as a defence to an action on it (*Scholfield*, 1894, L. R. 2 Q. B. 660). While the holder has in general a right to use the signature on an inchoate bill as that of a drawer, acceptor, or endorser, his right is not so absolute as to entitle him to use a signature on the back of a printed form, and therefore impliedly intended as the signature of an endorser, as that of a drawer or acceptor. The authority of a person in possession of an incomplete bill to supply the omissions may be limited to a certain extent by notes on the bill, although not forming part of it, and may be revoked, and impliedly is revoked, by the sequestration of the signer. Such revocation, whether actual or implied, does not affect the rights of a holder in due course (*M'Meekin*, 1881, 8 R. 587).

Bill must be completed within reasonable Time.—(2) In order that any such instrument, when completed, may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Thus a bill payable on demand must probably be completed in a shorter period than one drawn at a currency.

Completed Bill in hands of Holder in due course.—If any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given. As any fact relating to a bill which is relevant to any question of liability thereon may be proved by parole evidence (s. 100), a defence by the signer to an action on the bill by the holder, to the effect that the holder knew at the time of taking it that it had been delivered in an incomplete state, and that it was not intended that it should be filled up for the amount it bears, would be sustained (*Lyon*, 1841, 4 D. 178). If such holder negotiate the bill to one who knows that it was filled up in contravention of the authority given, such holder, if not a party to any fraud or illegality affecting it, has all the rights of the holder from whom he took

the bill (s. 29 (3); *see* also *Garrard*, 1882, L. R. 10 Q. B. D. 30). A holder in due course is not deprived of his rights because the blank stamped paper is only filled up by the person in possession after the lapse of the prescriptive period (*Montague*, 22 L. J. C. P. 187), nor from the fact that between the date of the delivery of the signature and the filling up of the blank paper, the signer has been bankrupt and discharged (*Ex parte, Hayward*, 1871, L. R. 6 Ch. 546).

21. *Delivery.*—(1) Every contract on a bill, whether it be the drawer's, the acceptor's, or an endorser's, is incomplete and revocable until delivery (s. 2) of the instrument in order to give effect thereto (*Martini*, 1878, 6 R. 342). Provided that where an acceptance is written on a bill, and the drawee gives notice to, or according to the directions of, the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable. In this country, where the sender of a letter cannot get it returned after it has been posted, if the endorsee of a bill authorises the endorser to send the bill through the post office, the bill, as soon as it is posted, becomes the property of the endorsee (*Ex parte Cote*, 1873, L. R. 9 Ch. Appeals, 27).

But though until delivery there is no contract on the bill, and the drawee may cancel his signature and return the bill unaccepted, he may still be liable in damages for his refusal to accept. It is an apparent exception to this rule, that if the drawee have funds of the drawer in his hands, presentation of the bill to him operates as an intimated assignation of such funds in favour of the holder (s. 53 (2)); but it is explicable, on the ground that the drawee's liability is not founded on the bill, but upon the fact of his indebtedness to the drawer, of his right to enforce payment, of which the bill is the assignation (Wallace and M'Neil, *Banking Law*, 96; Thorburn on *Bills of Exchange*, 59). (2) As between immediate parties, and as regards a remote party other than a holder in due course (s. 29), the delivery, (*a*) in order to be effectual, must be made either by or under the authority of the party drawing, accepting, or endorsing, as the case may be; (*b*) may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the bill. Thus, if a bill bear that it is transferred conditionally, any person taking it is affected by the condition (s. 35). If the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed (s. 20). (3) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or endorser, a valid and unconditional delivery by him is presumed until the contrary is proved.

4. Capacity and Authority of Parties.

22. *Capacity to Sign Bills.*—(1) Capacity to incur liability (ss. 53–8) as a party to a bill is co-extensive with capacity to contract (see Capacity). Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or endorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations (see Company). In England, it has been decided by the Court of Appeal that an infant cannot bind himself by the acceptance of a bill, even though the bill is given for the price of necessaries supplied to him during infancy (*In re Soltykoff*, 1891, 1 Q. B. 413). (2) Where a bill is drawn or endorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or endorsement entitles the holder

(s. 2) to receive payment of the bill, and to enforce it against any other party thereto (s. 54 (2)).

23. *Signature of Parties Essential to Liability.*—No person (s. 2) is liable as a drawer (s. 55 (1)), endorser (s. 55 (2)), or acceptor (s. 54) of a bill who has not signed it as such. No person can be liable on a bill except in one of these three capacities (*Walker's Trs.*, 1880, 7 R. (H. L.) 85).

Trade or Assumed Name.—(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name. No one can accept a bill except the drawee; but if the acceptor sign a different name from that of the person to whom the bill is addressed, the holder is entitled to prove that the signature is the signature of the trade or assumed name of the drawee. Such a bill would not warrant summary diligence.

Partnership.—(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm. "Where a signature is common to an individual and a firm of which the individual is a member, a *bonâ fide* holder for value, without notice whose paper it is, of a bill of exchange with such signature attached, has not an option to sue either the individual or the firm. But there is a presumption that the bill was given for the firm, and is binding upon it, at least where the individual carries on no business separate from the business of the firm of which he is a member. This presumption, however, may be rebutted by proof that the bill was signed, not in the name of the partnership, but of the individual for his private purposes; and it is immaterial that the *bonâ fide* holder took the bill as the bill of the proprietors of the business carried on by the partnership, whoever they may be, and not merely as the bill of the individual" (*Yorkshire Banking Co.*, 1879, L. R. 4 C. P. D. 204; L. R. 5 C. P. D. 109). If a bill is addressed to a firm, and is accepted by a partner thereof in the firm's name, the addition of that partner's own name beneath that of the firm does not render the partner separately liable (*In re Barnard*, 1886, L. R. 32 Ch. D. 447). A firm's signature to a bill by one of the partners after the dissolution of the copartnery does not bind the firm or the other partners (*Goodwin*, 1890, 18 R. 193). As to fraudulent use of firm's name by one of the partners (*Paterson Bros.*, 1891, 18 R. 403), see also PARTNERSHIP.

24. *Forged or Unauthorised Signature.*—Subject to the provisions of the Act (ss. 54 (2), 55 (2), 60, 80, and 82), where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill, or to give a discharge therefor, or to enforce payment thereof against any party thereof, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Thus a person may by his conduct be barred *personali exceptione* from denying the genuineness of his signature to an innocent holder (*Brook*, 1871, L. R. 6 Ex. 89; *Arnold*, 1876, L. R. 1 C. P. D. 578). But when a person comes to know that his signature has been forged to a bill, mere delay on his part in giving notice of the forgery to the bill-holder will not necessarily imply adoption nor bar him from repudiating liability, unless the bill-holder or others have been prejudiced by his silence (*M'Kenzie*, 1881, 8 R. (H. L.) 8). No one can be a holder in due course of a bill who derives his title through a forged endorsation (ss. 20, 54(2), 59, and 64).

Ratification of Unauthorised Signature.—Nothing in the section affects the ratification of an unauthorised signature not amounting to a forgery, that is,

nothing prevents a signature not forged but adhibited without authority from being subsequently ratified, so as to preclude the person so ratifying from pleading that it had been adhibited without his authority.

25. *Procuration Signatures.*—A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent, in so signing, was acting within the actual limits of his authority. Where an agent accepts or endorses *per* procuration, the taker of the bill or note so accepted or endorsed is bound to inquire as to the extent of the agent's authority: and where an agent has such authority, his abuse of it does not affect a *bonâ fide* holder for value (*Bryant*, 1893, Appeal Cases, 170). See also AGENCY; PROCURATION TO SIGN BILLS.

26. *Persons Signing as Agent or in a Representative Capacity.*—Where a person (s. 2) signs a bill as drawer, endorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a respresentative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent or as filling a representative character does not exempt him from personal liability. Thus, if a person who has no authority to do so sign a bill as agent for a disclosed principal and the principal repudiate liability, the agent is not liable on the bill, though he may be liable personally to indemnify the holder for any loss sustained (*Polhill*, 1 L. J. K. B. 92). But where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it (*Kelner*, 1866, L. R. 2 C. P. 174; *see* also *M'Meekin*, 1889, 16 R. 363). Where a company has, by its Memorandum and Articles of Association, power to draw and accept bills, the directors or other officials signing "for and on behalf of" the company are not personally liable. A different result follows where the company has no such power. Here the persons signing would be personally liable to a holder for value, as by their acceptance they represented that they had authority to accept on behalf of the company, which, being a false representation of a matter of fact and not of law, gave a cause of action to the holder who had acted upon it (*West London Commercial Bank*, 1883, L. R. 12 Q. B. D. 157; affd. 1884, L. R. 13 Q. B. D. 360). (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted.

5. THE CONSIDERATION OF A BILL.

27. *Value and Holder for Value.*—Before dealing with this section, the law regarding the consideration for a bill may thus be generally stated. To render a bill valid in Scotland, it does not require to have been granted for value, adequate or inadequate (*Law*, 1876, 3 R. 1192), nor do the words "for value received" require to form part of it, whether value have been received or not. In the cases following, the plea that the bill was granted for no valuable consideration may be a relevant defence which, if proved, will preclude the holder, though not an original party but not a holder in due course (s. 29), from enforcing it (*a*) where the bill has been signed without intention to grant an obligation, or where it has been obtained by fraud, force, or fear (see FRAUD); (*b*) where a bill has been given under an agreement that it was to be used only on a certain consideration, which has failed; (*c*) where it is an accommodation bill; (*d*) where it is given for an immoral or illegal consideration, or one which the law does not recognise.

A bill, however, given by one person to another for a gambling debt and endorsed to a third party for value, is valid, and entitles the holder to recover upon it, even although he was aware at the time of taking it that it had been given for a gambling debt, as such a consideration is not illegal, but only voidable, under 8 & 9 Vict. c. 109 (*Lilley*, 56 L. J. Q. B. 248); (*c*) where the bill is reducible by the granter's creditors. (1) *Valuable consideration* for a bill may be constituted by (*a*) any consideration sufficient to support a simple contract; (*b*) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time. (2) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time. (3) Where the holder of a bill has a lien on it, arising either from contract or implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (see BANKER'S LIEN).

28. *Accommodation Bill or Party.*—See ACCOMMODATION BILL.

29. *Holder in Due Course.*—(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it (ss. 3, 64), under the following conditions, namely:—(*a*) That he became the holder of it before it was overdue (ss. 14, 36 (3)), and without notice that it had been previously dishonoured, if such was the fact: (*b*) that he took the bill in good faith (s. 90), and for value (s. 27), and that, at the time the bill, was negotiated to him, he had no notice or knowledge of any defect (*Jones*, L. R. 2 Appeal Cases, 632) in the title of the person who negotiated it. No one can be a holder in due course of a bill the signature to which has been forged or adhibited without authority (s. 24). (2) In particular, the title of a person (s. 2) who negotiates (ss. 31–8) a bill is defective within the meaning of the Act when he obtained the bill or the acceptance thereof by fraud, duress or force, and fear or other unlawful means (as, for example, by theft), or for an illegal consideration (s. 27), or when he negotiates it in breach of faith or under such circumstances as amount to a fraud. A person whose title is defective is to be distinguished from one who has no title at all (s. 24). (3) A holder (s. 2), whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (ss. 20, 21 (2), 38, 54 (2), 55, 56, 64, 88 (2).

30. *Presumption of Value and Good Faith.*—(1) Every party whose signature (ss. 3, 17, 20, 91) appears on a bill is *primâ facie* deemed to have become a party thereto for value (s. 27). (2) Every holder (s. 2) of a bill is *primâ facie* deemed to be a holder in due course (s. 29), but this presumption may be overcome by parole evidence (s. 100). If in an action (s. 2) on a bill it is admitted or proved that the acceptance, issue (s. 2), or subsequent negotiation (ss. 31–7) of the bill is affected with fraud, duress or force, and fear or illegality (s. 29), the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value (s. 27) has in good faith (s. 90) been given for the bill. Where fraud is averred and proved, the burden of proof is on the pursuer to show that value has been given, and that it has been given in good faith, without notice of any fraud (*Tatam*, L. R. 23 Q. B. D. 345).

6. NEGOTIATION OF BILLS.

31. *What constitutes Negotiation.*—(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute

the transferee the holder of the bill. Thus the delivery of unendorsed bills payable to order to a person is not negotiation of them, though the conversion of a simple transferee into a holder is (per Stirling, J., in *Day*, 1893, W. N. 3). (2) A bill payable to bearer (ss. 2, 8 (3)) is negotiated by delivery (ss. 2, 21). (3) A bill payable to order is negotiated by the endorsement of the holder completed by delivery (s. 21). As to forged endorsations, *see* s. 24. The following may negotiate bills for a named holder: (*a*) an agent having authority to do so (s. 25), (*b*) an executor, or (*c*) a trustee in bankruptcy (19 & 20 Vict. c. 79, s. 102).

Transfer for Value without Endorsation.—(4) Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferror had in the bill, and the transferee, in addition, acquires the right to have the endorsement of the transferror. In the event of the bill being subsequently endorsed, it is a question what date will be held to be the date of delivery. It is thought that the date of delivery must be taken to be the date of endorsement, and not of delivery. (5) Where any person is under obligation to endorse a bill in a representative capacity, he may endorse it in such terms as to negative personal responsibility (as to mode of doing so, *see* ss. 16 (1) and 26).

32. *Requisites of a Valid Endorsement.*—An endorsement, to operate as a negotiation, must comply with the following conditions, namely: (1) It must be written on the bill itself and signed by the endorser. The simple signature of the endorser on the bill, without additional words, is sufficient. An endorsement on a separate paper is not a valid negotiation of a bill, but may entitle the person to whom the paper is delivered to have the bill duly endorsed to him. The fact that a person writes his name on the back of a bill and hands it to another, does not necessarily constitute him an endorser, but he may be liable as a guarantor. Thus, where a person endorsed a bill to the effect that, in case of non-payment by the acceptor, the bill was to be presented to him, it was held that, although he could not be sued as an endorser, he was liable as a guarantor (*Stagg, Mantle, & Co.*, 1895, 12 T. L. R. 12). An endorsement written on an allonge or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself. An "allonge" (Fr. *allonge*, lengthening, drawing out) is the term applied to a slip of paper attached to a bill upon which the supernumerary endorsements are written. See ALLONGE. A copy is not to be confounded with one of the bills in a set (s. 71), nor with the duplicate of a lost bill (s. 69).

Partial Endorsement.—(2) The endorsement must be an endorsement of the entire bill. A partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negotiation of the bill (ss. 7 (2), 34 (3)). There seems nothing incompetent to the holder, after receiving a payment to account, to negotiate the bill *quoad* the balance, for then that is the "sum payable."

Several Payees or Endorsees.—(3) Where a bill is payable to the order of two or more payees or endorsees who are not partners, and even then if the business be not one where power to endorse is presumed (*Garland*, L. R. 8, Ex. 216), all must endorse, unless the one endorsing has authority to endorse for the others.

Misdescription of Payee or Endorsee.—(4) Where, in a bill payable to order, the payee or endorsee is wrongly designated, or his name mis-spelt, he may endorse the bill as therein described, adding, if he think fit, his proper

signature. If the proper signature is not added, summary diligence is incompetent.

Order of Endorsements.—(5) Where there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill until the contrary is proved.

Kinds of Endorsements.—(6) An endorsement may be made in blank or special (s. 34). It may also contain terms making it restrictive (s. 35) or conditional (s. 33).

33. *Conditional Endorsement.*—Where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid whether the condition has been fulfilled or not.

34. *Blank Endorsement.*—(1) An endorsement in blank specifies no endorsee, and a bill so endorsed becomes payable to bearer. A blank endorsement may be made either by writing a simple signature on the bill, or by writing above the signature the words "Pay to or order," or "Pay to or bearer." A blank endorsement followed by a special endorsement remains payable to bearer, but the holder must cancel the endorsements subsequent to the blank endorsement. A person taking a bill in such circumstances may be affected by notice that his transferror's title is defective.

Special Endorsement.—(2) A special endorsement specifies the person to whom, or to whose order, the bill is to be payable (s. 8 (4, 5)). "Pay to *A. B.*," "Pay to *A. B.* or order," or "Pay to *A. B.*'s order," are special endorsements. (3) The provisions of the Act relating to a payee apply, with the necessary modifications, to an endorsee under a special endorsement (s. 7).

Conversion of Blank into Special Endorsement.—(4) When a bill has been endorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature a direction to pay the bill to, or to the order of, himself or some other person.

Restrictive Endorsement.—(5) Where a restrictive endorsement authorises further transfer (s. 35), all subsequent endorsees take the bill with the same rights, and subject to the same liabilities, as the first endorsee under the restrictive endorsement.

35. *Restrictive Endorsement.*—(1) An endorsement is restrictive which prohibits the further negotiation (s. 31) of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be endorsed "Pay *D.* only," or "Pay *D.* for the account of *X.*," or "Pay *D.* or order for collection." "Pay to *A. B.* or order value in account with *C. D.*" is not a restrictive endorsement, but, in effect, a simple endorsement "to *A. B.* or order" (*Buckley*, L. R. 3 Ex. 135).

Rights and Powers of Restricted Endorsee.—(2) A restrictive endorsement gives the endorsee the right to receive payment of the bill (ss. 38 and 59), and to sue any party thereto that his endorser could have sued, but gives him no power to transfer his rights as endorsee, unless it expressly authorises him to do so. A person to whom a bill is restrictively endorsed for collection, and who pays the amount of the bill to the endorser, cannot, because of such payment, acquire rights on the bill against the acceptor where the amount is paid to the endorser before maturity. The endorsee may delegate his duty of collection to a third party if the words "or order" are added to the endorsation, but under an endorsation such as "Pay *A. B.* for my account," *A. B.* cannot authorise a third party to collect it for him.

36. *Negotiation of Overdue Bills.*—(1) Where a bill is negotiable in its

origin (s. 8 (1)), it continues to be negotiable until it has been (*a*) restrictively endorsed (s. 35), or (*b*) discharged by payment or otherwise (s. 61–4). The fact that an action has been brought on a dishonoured bill, does not operate to make the bill non-negotiable. A prescribed bill cannot be negotiated, for then it is extinguished by the running of the years of prescription (see PRESCRIPTION). (2) Where an overdue bill (ss. 11, 14) is negotiated (s. 31), it can only be negotiated subject to any defect of title (s. 29 (2)) affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title (ss. 29 (3), 38) than that which the person from whom he took it had. (3) A bill payable on demand (s. 10) is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact. The *onus* is on the person assailing the holder's title to prove that the bill has been in circulation for an unreasonable length of time.

Presumption as to Date of Negotiation.—(4) Except where an endorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue. An undated endorsement is, in Scotland, presumed to have been made of the same date as the bill. The date of an endorsement is presumed to be the true date, in the absence of proof to the contrary (s. 13 (1)).

Negotiation of Dishonoured Bills.—(5) Any person who takes a dishonoured bill (s. 43) which is not overdue, with notice of the dishonour, takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this subsection affects the rights of a holder in due course (s. 29 and 38). A bill known to be dishonoured is thus upon the same footing as one overdue.

37. *Negotiation of Bill to Party already Liable thereon.*—Where a bill is negotiated back to the drawer, or to a prior endorser (cf. s. 59 (2)), or to the acceptor (s. 59 (1)), such party may, subject to the provisions of the Act (ss. 59–64), reissue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable. An acceptor who is the holder at or after maturity cannot reissue the bill (s. 61), nor can a drawer or endorser who is an accommodated party, if he have paid the bill in due course (s. 59 (3), also ss. 62, 63, 64).

7. RIGHTS AND DUTIES OF HOLDER.

38. *Rights and Powers of Holder.*—The rights and powers of the holder of a bill are as follows:—(1) He may sue on the bill in his own name. If, however, a bill be payable to a specified person or persons, any action on the bill must be raised in the name of such person or persons. (2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill (ss. 20, 21, 29 (3), 54–6, 64, 88). (3) Where his title is defective (as, for example, if he be a thief, finder, or one who has obtained the bill by fraud or violence (s. 29 (2)), if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and if he obtain payment of the bill, the person who pays him in due course gets a valid discharge for the bill. The *right* to negotiate a bill, which is an incident of ownership, is not to be confounded with the *power* to negotiate it, which is an incident of apparent ownership. On the death of a holder,

his rights pass to his executors; and on his bankruptcy, if he be the beneficial owner of the bill, or if the bill be payable to a bankrupt for his own account, his rights pass to his trustee. If the holder be not the beneficial owner of the bill (and provided that he was not the reputed owner of it), the title does not pass to the trustee. A bill may be made the subject of a donation *mortis causa* (*Austin*, 1880, 15 Ch. Div. 651). See DONATION.

General Duties of the Holder.—A party to a bill who is discharged from liability by reason of the holder's omission to perform any duty, is also discharged from liability on the debt or consideration for which the bill was given.

39. *When Presentment for Acceptance is Necessary.*—(1) Where a bill is payable after sight (s. 40), presentment for acceptance is necessary in order to fix the maturity of the instrument. The acceptance should be dated, but the want of a date does not affect the maturity of the bill. It is competent to the holder to insert the true date; but if he insert a wrong date in good faith and by mistake, or if the bill, with a wrong date, subsequently come into the hands of a holder in due course, the insertion of a wrong date renders the bill payable on that date (ss. 12, 13, and 20). (2) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable, elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment. In order to be effectual, the stipulation must appear *ex facie* of the bill. (3) In no other case is presentment for acceptance necessary in order to render liable any party to the bill. (4) Where the holder of a bill drawn payable elsewhere than at the place of business or residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and endorsers. "Reasonable diligence" varies according to circumstances (*Van Diemen's Land Bank*, L. R. 3 P. C. 526; *Gladwell*, L. R. 5 Ex. 59).

40. *Time for Presenting Bill Payable after Sight.*—Subject to the provisions of the Act (ss. 5 (2), 38, 41 (2), 89 (3)), when a bill payable after sight is negotiated, the holder must either present it for acceptance (s. 41) or negotiate (s 31) it within a reasonable time. (2) If he do not do so, the drawer and all endorsers prior to that holder are discharged. (3) In determining what is a reasonable time within the meaning of this section, regard is had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case. The time will be reckoned from the date when the holder receives the bill, and with reference to the time each successive holder keeps it.

41. *Rules for Presentment for Acceptance, and Excuses for Non-Presentment.*—(1) A bill is duly presented for acceptance (s. 2) which is presented in accordance with the following rules:—

By Whom, to Whom, and When.—(*a*) The presentment must be made by or on behalf of the holder to the drawee, or to some person authorised to accept or to refuse acceptance on his behalf, at a reasonable hour on a business day, and before the bill is overdue. Where a bill is drawn on a firm whose business entitles a partner to accept bills, presentment to one of the partners is sufficient. Where a bill is drawn on a company incorporated under the Companies Acts, presentment must be made to a person who has the authority of the company to accept bills (Companies Act, 1862 (25 & 26 Vict. c. 89, s. 47)). As to non-business days, *see* s. 92. "Reasonable hours," in the case of a trader, mean business hours; and in the case of a

banker, banking hours. Where the drawee is not in business, it is a jury question whether the bill has been presented in reasonable hours.

Two or more Drawees.—(*b*) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all unless one has authority to accept for all, then presentment may be made to him only. A bill addressed to several drawees, acceptance of which is refused by one, need not be presented to the others (s. 19, 44 (1)), since such an acceptance is qualified, and the taking of it without assent, express or implied, of the drawer and endorsers discharges them.

Drawee Dead or Bankrupt.—(*c*) Where the drawee is dead, presentment may be made to his personal representative. (*d*) Where the drawee is bankrupt, presentment may be made to him or to his trustee. In these two cases, presentment, in accordance with the foregoing rules, is excused, and the bill may be treated as dishonoured (see following subs. 2 (*a*)).

Presentment through the Post Office.—(*e*) Where authorised by agreement or usage, a presentment through the post office is sufficient (s. 45 (8), 49 (15)).

Cases in which Presentment is Excused.—(2) Presentment in accordance with the foregoing rules is excused, and a bill may be treated as dishonoured by non-acceptance, (*a*) where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill. As to persons not having capacity to contract by bill, *see* s. 22. Where the person to whom the bill is addressed is a fictitious person, or a person not having capacity to contract by bill, the holder may treat the instrument as a note (s. 5 (2)), to which the provisions as to presentment for acceptance do not apply (89 (3*a*)). (*b*) Where, after the exercise of reasonable diligence, such presentment cannot be effected. (*c*) Where, although the presentment has been irregular, acceptance has been refused on some other ground. (3) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured, does not excuse presentment. Presentment for acceptance differs from presentment for payment, in that it should be personal, and that it is immaterial where it is made; whereas presentment for payment should be local, and where the money is. This distinction may be material in deciding whether the holder has used reasonable diligence in presenting.

42. *Non-Acceptance.*—(1) When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and endorsers. The drawee may require that the bill be left with him for acceptance, and he is entitled to retain it for the customary period, which is usually twenty-four hours, but varies according to the custom of the place of presentment. In reckoning the period, non-business days are excluded (s. 92). On the lapse of this time, the drawee must deliver the bill, accepted or not accepted. If it is not delivered accepted, the holder must have it noted for non-acceptance, or otherwise treated as dishonoured. As to protest for non-delivery, *see* s. 51 (8).

43. *Dishonour by Non-Acceptance and its Consequences.*—(1) A bill is dishonoured by non-acceptance—(*a*) when it is duly presented for acceptance (s. 41 (1)), and such an acceptance as is prescribed by the Act (ss. 17, 19, 44) is refused or cannot be obtained; or (*b*) when presentment for acceptance is excused (41 (2)), and the bill is not accepted. (2) Subject to the provisions of the Act (ss. 16, 22, 40, 48–51, 64, 65), when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and endorsers accrues to the holder, and no presentment for payment

is necessary. Notice of dishonour must, however, be given, and the bill protested where necessary. (For form of notice, *see* beginning of this article.)

44. *Duties as to Qualified Acceptances.*—(1) The holder of a bill may refuse to take a qualified acceptance (s. 19); and if he does not obtain an unqualified acceptance, may treat the bill as dishonoured by non-acceptance. (2) Where a qualified acceptance is taken, and the drawer or an endorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or endorser is discharged from his liability on the bill. The provisions of this subsection do not apply to a partial acceptance whereof due notice has been given (s. 49). The notice should be of a partial acceptance, not of dishonour. (For form of notice, *see* beginning of this article.) Where a foreign bill (ss. 4, 51 (2)) has been accepted as to part, it must be protested as to the balance (ss. 51, 73 (2)). (3) When the drawer or endorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto.

45. *Rules as to Presentment for Payment.*—Subject to the provisions of the Act (ss. 39 (4), 43, 46, 66, 67), a bill must be duly presented for payment. Presentment for payment implies a demand for payment (per Lord Ordinary in *Bartsch*, 1895, 23 R. 328). If it be not so presented, the drawer and endorsers are discharged. A bill is duly presented for payment which is presented in accordance with the following rules:—

(1) Where the bill is not payable on demand, presentment must be made on the day it falls due, that is, the last day of grace (s. 14).

(2) Where a bill is payable on demand (s. 10), then, subject to the provisions of the Act, presentment must be made within a reasonable time after its issue (s. 2) in order to render the drawer liable, and within a reasonable time after its endorsement (s. 2) in order to render the endorser liable. In determining what is a reasonable time, regard is had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case (ss. 40, 86).

(3) Presentment must be made by the holder (that is, the bearer in a bill payable to bearer, and the payee or endorsee in a bill payable to order, but not a person holding under a forged endorsement (ss. 2, 24)), or by some person authorised to receive payment on his behalf, at a reasonable hour (s. 41 (*a*)) on a business day (s. 92) at the proper place as after defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if, with the exercise of reasonable diligence, such person can there be found. It is not necessary to present to a referee in case of need (s. 15). Presentment is not excused because of the acceptor's bankruptcy, and presentment must be made to the bankrupt. In the case of a company being wound up, presentment is made to the liquidator (*In re Agra Bank*, L. R. 5 Eq. 160).

(4) A bill is presented at the proper place—

(*a*) Where a place of payment is specified in the bill, and the bill is there presented. Presentment to the acceptor is not sufficient where a place of payment is specified. Where a bill is domiciled at a bank in a town in which there is a clearing house, presentment through the clearing house is deemed presentment at the bank. Where there are alter-

native places of payment, presentment at one of these places is sufficient. It is sufficient presentation if the bill be presented at the place of payment specified in the bill, although the acceptor may have left there.

(*b*) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(*c*) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business, if known, and if not, at his ordinary residence, if known.

(*d*) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last-known place of business or residence.

(5) Where a bill is presented at the proper place, and, after the exercise of reasonable diligence, no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

(6) Where a bill is drawn upon or accepted by two or more persons who are not partners and no place of payment is specified, presentment must be made to them all. A refusal on the part of one does not, as in the case of presentment for acceptance, dispense with presentment to the others.

(7) Where the drawee or acceptor of a bill is dead and no place of payment is specified, presentment must be made to a personal representative, if such there be and with the exercise of reasonable diligence he can be found.

(8) Where authorised by agreement or usage, a presentment through the post office is sufficient. Should accidents happen at the post office, and delay arise thereby in the presentation of the bill, it is thought that the holder would not not lose his right of recourse against the drawer and prior endorsers (*Higgins*, 1847, 9 D. 1407; 1848, 6 Bell's Appeal Cases, 195; *House Fire Insur. Co.*, L. R. 4 Ex. Div. 216).

46. *Excuses for Delay or Non-Presentment for Payment.*—(1) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence, as, for example, by his sudden illness or death, or that of his agent intrusted with the bill for presentation, or in consequence of unavoidable business, or his distance from the post office. When the cause of delay ceases to operate, presentment must be made with reasonable diligence (s. 39). (2) Presentment for payment is dispensed with (*a*) where, after the exercise of reasonable diligence, presentment as required by the Act cannot be effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment. Thus, where the drawer of a bill, after its maturity, wrote the holder accepting notice of non-payment, and admitting his liability to him in every way, as though presentment had been made in the regular way, it was held that the bill *de facto*, not having been presented, though the drawer was ignorant of the fact, there was no dispensation by the drawer of the consequences of non-presentment for payment (per Pollock, B., in *Keith*, 1 C. & E. 551). The fact of the acceptor's bankruptcy does not dispense with presentation (*b*) where the drawee is a fictitious person (s. 5 (2)); (*c*) as regards the drawer, where the drawee or acceptor is not

bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented, as, for example, where the acceptor is an accommodation party (*see* ACCOMMODATION BILL); (*d*) as regards an endorser, where the bill was accepted or made for the accommodation of that endorser, and he has no reason to expect that the bill would be paid if presented; (*e*) by waiver of presentment, express or implied, as where the drawer induces the holder to delay presentment, or as where the acceptor, having become bankrupt before maturity, and the holder did not present for payment, the drawers waived their right to plead non-presentment by letters subsequent to the date of maturity in which they asked for delay, and by implication acknowledged their liability. The following cases may be cited as illustrating what has been held to constitute waiver of presentment:—*Rogers*, 2 Durnford and East, T. R. 13; *Kilby*, 18 Scott. C. B. Reports (N. S.), 357; *Taylor*, 2 Camp. 105; *Lundie*, 7 East, 231; *Hodge*, 3 Camp. 462.

47. *Dishonour by Non-Payment.*—(1) A bill is dishonoured by non-payment when it is duly presented for payment (s. 45) and payment is refused or cannot be obtained, or when presentment is excused (s. 46) and the bill is overdue (ss. 14, 45) and unpaid. (2) Subject to the provisions of the Act (ss. 16, 22, 48–51, 63 (2), 64, 67 (2, 4), 68 (7), when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder.

48. *Notice of Dishonour.*—Subject to the provisions of the Act (ss. 29, 36 (3), 38 (2), 50), when a bill has been dishonoured by non-acceptance or non-payment (ss. 43, 47), notice of dishonour (for form, *see* beginning of this article) must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged. To constitute notice of dishonour, there must be a notification from the holder to the drawer and endorsers, which conveys to them the information of the fact of the dishonour, though it is not necessary that such notification be in any prescribed form. Notice of dishonour to an endorser means something more than that the endorser has knowledge of the dishonour; that knowledge must be conveyed to him by a notification from the holder. (1) Where a bill is dishonoured by non-acceptance and notice of dishonour is not given, the rights of a holder in due course (s. 29) subsequent to the omission are not prejudiced by the omission. (2) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it is not necessary to give notice of a subsequent dishonour by non-payment, unless the bill has in the meantime been accepted (s. 18 (3)).

49. *Rules as to Notice of Dishonour.*—Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules:—

By Whom.—(1) The notice must be given by or on behalf of the holder, or by or on behalf of an endorser, who at the time of giving it is himself liable on the bill (ss. 16, 40, 63 (2)). (2) Notice of dishonour may be given by an agent authorised to do so, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

Effect of Notice by Holder.—(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior endorsers, who have a right of recourse against the party to whom it is given.

Effect of Notice by Endorser.—(4) Where notice is given by or on behalf of an endorser entitled to give notice as before provided, it enures for the benefit of the holder and all endorsers subsequent to the party to whom notice is given.

Mode of Giving Notice.—(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill (as by specifying its date, sum, and the parties to it) and intimate that the bill has been dishonoured by non-acceptance or non-payment, as the case may be. The fact of its having been noted or protested, and that recourse is claimed against the party to whom the notice is given, should be intimated. The onus of proving notice is on the holder. The identification of the bill need only be such as to leave the party notified in no doubt as to the bill referred to: and consequently notice to a person unaccustomed to deal with bills, or who has his name only to one or two, need not be so detailed as that to a person in business, who is in the habit of frequently subscribing bills, and who therefore may have difficulty in identifying a particular bill in the absence of precise details.

Implied Notice of Dishonour.—(6) The return of a dishonoured bill to the drawer or an endorser is, in point of form, deemed a sufficient notice of dishonour.

Unsigned Notice.—(7) A written notice need not be signed.

Insufficient Notice.—An insufficient written notice may be supplemented and validated by verbal communication.

Wrong Description in Notice.—A mis-description of the bill, as, for example, where it is described as a note, where it is wrongly said to be payable at a particular bank, where the drawer is described as the acceptor, or generally any mis-description which could not mislead the person to whom notice is given, does not vitiate the notice, unless the party to whom notice is given is, in fact, misled thereby. But where the notice is one which could not reasonably mislead a drawer or endorser, a mere plea to the effect that he was, in point of fact, misled, is not sufficient.

To whom Notice may be Given.—(8) When notice of dishonour is required to be given to any person, it may be given either to himself or to his agent in that behalf. Notice to his solicitor is not, but notice to a merchant's clerk given at his counting-house is, sufficient. A referee in case of need is not, for this purpose, the agent of the person inserting his name (*In re Leeds Bank Co.*, L. R. 1 Eq. 1). (9) Where the drawer or endorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and, with the exercise of reasonable diligence, he can be found. (10) Where the drawer or endorser is bankrupt, notice may be given either to the party himself or to his trustee. (11) Where there are two or more drawers or endorsers, who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

Time for Giving Notice.—(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless, (*a*) where the person giving and the person to receive notice reside in the same place, the notice be given or sent off in time to reach the latter on the day after the dishonour of the bill, non-business days being excluded (s. 92); or, (*b*) where the person giving and the person to receive notice reside in different places, the notice be sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter, non-business days being excluded (s. 92).

Notice by Agent.—(13) Where a bill, when dishonoured, is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his

principal, he must do so within the same time as if he were the holder; and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

Notice to Remote Parties.—(14) Where a party to a bill receives due notice of dishonour, he has, after receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

Miscarriage of Notice in Post.—(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office. Where a notice is not properly addressed, the party giving notice must prove that it was duly delivered (*Milligan*, 1829, 7 S. 489). If a holder does not know the address of an endorser, he is entitled to time to make inquiries.

50. *Delay in Giving Notice of Dishonour Excused.*—(1) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence (s. 46 (1)). When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

Notice of Dishonour Dispensed with.—(2) Notice of dishonour is dispensed with (*a*) when, after the exercise of reasonable diligence, notice as required by the Act (s. 49) cannot be given to, or does not reach the drawer or endorser sought to be charged; but failure by the holder of a bill, after the exercise of reasonable diligence at the time the bill is dishonoured, to find the drawer of the bill at the address he has given, does not dispense with notice of dishonour if an address at which the drawer is to be found comes to the knowledge of the holder before action is brought; (*b*) by waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice. Private knowledge on the part of the person to whom notice should be given does not imply waiver, and does not therefore dispense with notice; but waiver of notice by an endorser does not affect parties prior to him; (*c*) *as regards the drawer* in the following cases, namely—(1) where drawer and drawee are the same person; (2) where the drawee is a fictitious person, or a person not having capacity to contract (s. 22); (3) where the drawer is the person to whom the bill is presented for payment, or where the bill is made payable at his house. But where the bill is signed by the drawer in order to accommodate the acceptor, the drawer is entitled to notice; (4) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; (5) where the drawer has countermanded payment; (*d*) *as regards the endorser* in the following cases, namely—(1) where the drawee is a fictitious person, or a person not having capacity to contract, and the endorser was aware of the fact at the time he endorsed the bill; (2) where the endorser is the person to whom the bill is presented for payment, as where he becomes the executor of the acceptor. Where the bill is not duly stamped, no notice of dishonour need be given, as the holder must take action, not on the bill, but for the consideration for which the bill was granted. A guarantor for the due payment of a bill by the acceptor is not entitled to notice; (3) where the bill was accepted or made for his accommodation.

51. *Noting or Protest of Bill*—(For forms of protest, *see* beginning of this article).—(1) Where an inland bill (s. 4) has been dishonoured, it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be, but it is not necessary to note or protest any such bill in order to preserve the recourse against the drawer or endorser. Protest is, how-

ever, necessary in order to warrant summary diligence on the bill (s. 98); in the case of a bill drawn after sight, in order to fix the maturity of the bill (s. 14 (3)); and in certain cases after specified (ss. 65 (1), 67 (1, 4), 72 (3)). (2) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested for non-acceptance; and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested, the drawer and endorsers are discharged. A foreign bill payable on demand need not be protested to preserve the right of recourse of a holder in due course, provided it be presented for payment before it has been in circulation for an unreasonable length of time (ss. 8 (2), 36 (3)). Where a bill does not appear on the face of it to be a foreign bill, protest in case of dishonour is unnecessary. Under this subsection it has been decided in England that the drawers of a bill are entitled to the expenses of protest for non-payment, but not for the expenses of protest for better security, or for commission paid to their own bankers (*In re English Bank of the River Plate*, 1893, 2 Ch. 438. *See* also s. 57 (1)).

Successive Protests.—(3) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

Time for Noting and Protesting.—(4) Subject to the provisions of the Act, when a bill is noted or protested, it must be noted on the day of its dishonour. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (*M'Pherson*, 1885, 12 R. 942). Where the extended protest bears that the bill was protested on a date different from that on which the bill itself bears that the protest was noted, any diligence following thereon is inept.

Protest for Better Security.—(5) Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment, before it matures, the holder may cause the bill to be protested for better security against the drawer and endorsers. No right of recourse accrues to him till the date of maturity. A bill in such circumstances may be accepted *supra* protest (s. 65 (1)). In Scotland, where during the currency of a bill any of the parties liable on it becomes *rerygns ad inopiam*, the holder may obtain diligence, and use inhibitions so as to prevent the heritable property being disposed of, or use arrestments attaching the moveable property. The diligence is only granted on an averment of *vergens ad inopiam*, which the person applying for the diligence must take upon himself the responsibility of averring (*Dove*, 1865, 3 M. 339; *Symington*, 1875, 3 R. 206).

Place of Protest.—(6) A bill must be protested at the place where it is dishonoured (as to places where there is no notary, *see* s. 94), provided that —(*a*) when a bill is presented through the post office (s. 45 (8)) and returned by post dishonoured, it may be protested at the place to which it is returned, and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day. (*b*) When a bill drawn payable at the place of business or residence of some person other than the drawee has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

Requisites of Protest.—(7) A protest must contain a copy of the bill, must be signed by the notary making it, and must specify (*a*) the person at whose request the bill is protested; (*b*) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the

answer given, if any, or the fact that the drawee or acceptor could not be found. Where a bill is made payable at the creditor's own office, and on the day of payment the debtor, or some one on his behalf, is not there to pay or refuse payment, the proper form of protest is to record the fact that the drawee or acceptor could not be found at the place of payment, and not to insert in the protest that the bill was "presented at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly" (*Bartsch*, 1895, 23 R. 328). Although the protest must be made by a notary, it is not necessary that he should be present when the bill is presented, and he is warranted in making the protest upon the report of his clerk or other trustworthy person (Menzies on *Conveyancing*, 3rd ed., p. 367). The protest may be issued in duplicate or triplicate, but all must be duly stamped. Where the duty on the bill or note does not exceed one shilling, the duty on the protest is the same as on the bill. In any other case the duty is one shilling.

Protest of Lost Bill.—(8) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

When Protest may be Dispensed with.—(9) Protest is dispensed with by any circumstance which would dispense with notice of dishonour (s. 50 (2)). Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. The want of a notary does not excuse delay in noting or protesting (s. 94). When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence (s. 49).

52. *Duties of Holder as regards Drawee or Acceptor.*—(1) When a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable. A debtor is bound at common law to find out his creditor, and pay him. (2) When, by the terms of a qualified acceptance (s. 19), presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures. Should, however, the acceptor qualify his acceptance to the effect that he was only to be liable if the bill was presented on its due date, or within a certain specified time thereafter, he would be freed from his obligation if the bill were not so presented. (3) In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonour should be given to him. As regards the acceptor, a bill may be noted, protested, and summary diligence proceeded with at any time within six months after the maturity of a bill. (4) Where the holder of a bill presents it for payment, he must exhibit the bill to the person from whom he demands payment: and when a bill is paid, the holder must forthwith deliver it up to the party paying it. Payments to account are usually marked on the back of the bill, and initialled by the person receiving the money. By sec. 9 of the Finance Act of 1895 (58 Vict. c. 16), payments to account marked upon the back of a bill of the value of two pounds and upwards are liable in one penny of stamp duty.

8. Liabilities of Parties.

53. *Funds in hands of Drawee.*—(1) A bill of itself does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by

the Act is not liable on the instrument. This subsection does not apply to Scotland.

In Scotland, Bill Operates as an Intimated Assignation.—(2) In Scotland, where the drawee of a bill has in his hands funds available for the payment thereof, the bill operates as an assignment of the sum for which it is drawn in favour of the holder from the time when the bill is presented to the drawee (Thomson on *Bills*, 2nd ed., p. 104; Thorburn on *Bills*, p. 126). In an action against the drawee, the bill is founded on as an assignation, and not solely as a bill, the holder's right to recover being dependent on the existence of a debt due by the drawee to the drawer, and on the validity of the assignation of that debt to him. A bill granted for value cannot be countermanded by the drawer; and if the drawee refuse to pay, the holder's proper course is to raise an action of multiplepoinding (*Carter*, 1862, 24 D. 925). The acceptance of a bill payable at a banker's is authority to the banker to pay the bill to the extent of the balance at the acceptor's credit when the bill is presented for payment; and it is the banker's duty to his customer, the acceptor, to act on the authority, and pay accordingly. Bills are preferable according to their respective dates of presentation to the drawee.

54. *Liability of the Acceptor.*—The acceptor of a bill, by accepting it, (1) engages that he will pay it according to the tenor of his acceptance, that is, if the acceptance be unqualified, that he will pay the bill at maturity. If qualified, that he will pay subject to the qualification (s. 19); (2) is precluded from denying to a holder in due course (*a*) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (*b*) in the case of a bill payable to drawer's order, the then capacity of the drawer to endorse, but not the genuineness or validity of his endorsement; (*c*) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to endorse, but not the genuineness or validity of his endorsement. The acceptor may refuse to pay on the ground that the payee's signature is forged.

55. *Liability of Drawer.*—(1) The drawer of a bill, by drawing it, (*a*) engages that on due presentment (ss. 40, 41, 45) it shall be accepted and paid according to its tenor (ss. 14, 19, 44), and that if it be dishonoured (ss. 43, 47) he will compensate the holder or any endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (ss. 48–51); (*b*) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse.

Liability of Endorser.—(2) The endorser of a bill, by endorsing it, (*a*) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken (*Duncan, Fox, & Co.*, 1880, L. R. 6 App. Ca. 1); (*b*) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements; (*c*) is precluded from denying to his immediate, or a subsequent endorsee, that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto.

Liability of Successive Endorsers inter se.—The liabilities *inter se* of successive endorsers of a bill must, in the absence of evidence to the contrary, be determined according to the ordinary principles of the law merchant, whereby a prior endorser must indemnify a subsequent one. But the whole circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of

ascertaining the true relation to each other of the parties who put their signatures upon it, either as drawers or endorsers; and reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. Thus, where three directors of a company mutually agreed with each other to become sureties to a bank for the same debts of a company, and in pursuance of that agreement successively endorsed three promissory notes of the company, it was held that they were entitled and liable to equal contribution *inter se*, and that they were not liable to indemnify each other successively according to the priority of their endorsements (*Macdonald*, 1883, L. R. 8 App. Ca. 733). As regards a holder in due course, they are liable jointly and severally.

56. *Stranger signing Bill Liable as Endorser.* — Where a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course, and that although he signs at the place where it is usual for the acceptor to sign. Such a signature is known as one *per aval* (*aval*, said to be an antiquated word signifying underwriting, per L. Blackburn in *Walker's Trs.*, 1880, 7 R. (H. L.) 85), and by the law merchant can be given only to a person who thereafter takes the bill. As no one can sign a bill as an acceptor except the drawee (s. 17), a referee in case of need (s. 15), or an acceptor for honour (s. 65), a stranger cannot sign as an acceptor to a bill, and if he sign expressly as acceptor, as, for example, "accepted John Smith," his signature is wholly inoperative. One who subscribes a bill *per aval* really occupies the position of a cautioner: but the addition of that or a similar word, while indicating the character in which he subscribes, does not in any way limit or alter his liability. "Such an endorsement," says L. Watson in *Walker's Trs.*, *supra*, "creates no obligation to those who previously were parties to the bill: it is solely for the benefit of those who take subsequently. It is not a collateral engagement, but one on the bill, and it is for that reason, and because the original bill has incident to it the capacity of an endorsement in the nature of an 'aval,' that such an endorsement requires no new stamp" (*see* L. Watson's comment on this opinion in *Macdonald*, 1883, L. R. 8 App. Ca., at 748; *see* also *Macdonald*, 1864, 2 M. 963).

57. *Measure of Damages against Parties to Dishonoured Bill.*—Where a bill is dishonoured (ss. 43, 47), the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—(1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior endorser, (*a*) the amount of the bill; (*b*) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case (as to rate of interest, *see* note on s. 9): (*c*) the expenses of noting, or, when protest is necessary and the protest has been extended, the expenses of protest (as to expenses of protest for better security and banker's commission, *see* note on s. 51 (2)).

Bill Dishonoured Abroad.—(2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages the holder may recover from the drawer or an endorser, and the drawer or an endorser who has been compelled to pay the bill may recover from any party liable to him the amount of the re-exchange, with interest thereon until the time of payment. Under this section it has been decided by the Court of Appeal (*In re Gillespie*,

1886, L. R. 18 Q. B. D. 286) that the drawer of a foreign bill upon an acceptor in England is entitled, upon the bill being dishonoured and protested, to recover from the acceptor damages in the nature of re-exchange, which the drawer is by the foreign law liable to pay to the holder of the bill.

Interest as Damages.—(3) Where by the Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper.

58. *Liability of "Transferror by Delivery."*—(1) Where the holder of a bill payable to bearer (which includes a bill endorsed in blank, s. 34) negotiates it by delivery (ss. 21, 31 (2)), without endorsing it, he is called a "transferror by delivery." (2) A transferror by delivery is not liable on the instrument. Thus, where the holder of a bill which has been endorsed in blank discounts it without endorsing it, and the bill is subsequently dishonoured, he is not bound to repay the sum received.

Transferror's Warrant to Transferee.—(3) A transferror by delivery who negotiates a bill, thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless. If any of these considerations fail, he is liable to the transferee in compensation.

9. Discharge of a Bill.

59. *By Payment in Due Course.*—(1) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. Payment in due course means payment made at or after the maturity of the bill to the holder of it (or to his authorised agent, s. 45 (3)), in good faith (s. 90), and without notice that his title to the bill is defective (s. 29 (2)). A bill may be also discharged by renunciation or acceptilation (s. 62), by confusion (s. 61), by cancellation (s. 63), by compensation, novation, delegation, or by prescription (see Extinction of Obligations). While prescription extinguishes the bill, it does not discharge the debt for which the bill was granted. (2) Subject to the provisions hereinafter contained (subs. 3 *infra*), when a bill is paid by the drawer or an endorser, it is not discharged, but (*a*) where a bill payable to or to the order of a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill. In this subsection the word "paid" means, paid at or after the maturity of the bill. Consequently, if, during the currency of the bill, it has been negotiated back to the drawer, he may reissue and further negotiate it (s. 37); (*b*) where a bill is paid by an endorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he think fit, strike out his own and subsequent endorsements, and again negotiate the bill. The subsequent endorsers in such a case are discharged by the payment to the drawer or prior endorsers, and consequently, even if the bill be negotiated after payment and without cancellation of the signatures of the payer and subsequent endorsers, the endorsee can have no claim against such parties, as in these circumstances no holder can be a holder in due course (s. 29). (3) Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged.

60. This section, which deals with a banker's liability for paying a demand draft on a forged endorsement, is considered under Cheques (*on a Banker*).

61. *By Confusion.*—When the acceptor of a bill is or becomes the holder of it at or after its maturity (ss. 10, 14) in his own right, the bill is discharged. If the acceptor become the holder as executor, trustee, or other similar capacity, the bill is not discharged. The provision of the section does not apply to an acceptor for honour. Where a bill is granted for an advance on loan, the mere granting of a new bill and the giving up of the old bill do not operate a discharge of the claim for interest upon the loan (*Hope Johnstone*, 1895, 22 R. 314).

62. *Express Waiver.—Renunciation.*—(1) When the holder of a bill at or after its maturity (ss. 10, 14) absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation may be verbal if it be at the same time accompanied by the delivery of the bill. Otherwise the renunciation must be in writing, and it must be a record of an absolute and unconditional renunciation of the holder's rights on the bill or note (*In re George*, L. R. 44 Ch. D. 627: *Crawford*, 1873, 1 R. 91, 2 R. (H. L.) 148). A memorandum made by or with the authority of the holder, whether signed by him or not, to the effect that he renounces his rights, is not sufficient (*In re George*, *supra*; *Crawford*, *supra*); but such a writing, or even a letter expressing intention to renounce, might go to prove that a subsequent handing of the bill to the acceptor was made with that intention. The effect of such renunciation is to release the acceptor from all liability on the bill to the holder, or anyone claiming through him.

Conditional Renunciation.—Renunciation may be made conditional, and until the condition is purified there is no renunciation. Though the holder may in such circumstances be meantime barred from enforcing the bill, there is nothing to prevent him from negotiating it to a new holder for value, who will not be affected by his disabilities, and may enforce payment of the bill whether the condition be purified or not (*MacVean*, 1873, 11 M. 764). (2) The liabilities (ss. 54–6) of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in the section affects the rights of a holder in due course (s. 29) without notice of the renunciation.

63. *By Cancellation.*—(1) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

(2) In like manner, any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such a case, any endorser who would have had a right of recourse against the party whose signature is cancelled is also discharged.

(3) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority. Summary diligence would, however, be incompetent upon such a bill (s. 98). Where an agent is employed by the holder of a bill to receive payment of it from the acceptor, and receives payment from him clogged with a condition without assent to which the holder is not entitled to retain the money paid, the agent is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill before he has received the assent to the condition. In a comparatively recent case, the agent of a bank offered to try to obtain payment of a bill which had been protested for non-payment, and the holders accepted the offer. The acceptors offered

to pay the bill and the protest charges on the condition that they should not be called upon to pay interest and expenses. The bank's agent communicated this condition to the holders, and, without waiting for authority, took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors, who deleted their names thereon. Thereafter the holders intimated their refusal to agree to the conditions upon which payment had been made, refused to accept the sum tendered to them by the bank agent, and received back the bill cancelled, the money being repaid to the acceptors. The holders then raised an action against the acceptors for the amount of the bill with interest, and for the expenses of the action, and obtained decree; but the estates of the acceptors became bankrupt before diligence could be used against them. The holders then raised an action against the bank, concluding for the amount of the bill with interest, and for the expenses of their action against the acceptors. It was held that the evidence showed that if the bill had not been cancelled through the error of the bank agent, the holders might have recovered payment by summary diligence before the acceptors became bankrupt, and that the bank was liable, but was entitled to an assignation of the rights of the holders against the drawers of the bill (*Bank of Scotland*, 1889, 16 R. 1081; 1891, 18 R. (H. L.) 21; L. R. 1891, App. Ca. 592).

64. *By Alteration.—Apparent Alteration.*—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on it, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers. The holder may sue on the original debt, though he cannot sue on the bill. A bill may be altered before issue, that is, before its delivery, complete in form, to a person who takes it as a holder for value, so as to be able to enforce payment thereof, as until then there is no completed contract on the bill. An accommodation bill, it appears, is not issued within the meaning of this section until it has been delivered to someone who can sue on it (per Charles, J., in *Engel*, 53 J. P. 535). Where a bill is delivered which is awanting in a material part, the person in possession has *primâ facie* authority to fill up the omission in any way he thinks fit (s. 21). A material alteration after issue renders a bill a new instrument, requiring a fresh stamp (*Suffell*, 1882, L. R. 9 Q. B. D. 555).

Non-Apparent Alteration.—Where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor (*Leeds Bank*, 1883, 11 Q. B. D. 84).

Alterations which are Material.—(2) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. A mere correction is not a material alteration, nor is the addition of words which do not alter the effect of the bill as issued.

10. Acceptance and Payment for Honour.

65. *Acceptance for Honour* supra *Protest.*—(1) Where a bill has been protested for dishonour by non-acceptance (s. 43), or protested for better security (s. 51 (5)), and is not overdue (ss. 14, 45 (2)), any person (s. 2) not being a party already liable thereon may, with the consent of the

holder, intervene and accept the bill *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn, but not for the honour of the drawee, as, till acceptance, he is not liable on the bill; nor for the honour of an endorser who has endorsed restrictively (s. 16) or in a representative capacity (s. 26) (though it may be for the honour of his principal); nor for the honour of an endorser who has negotiated the bill back to the holder; nor for any party against whom recourse has been lost by failure to negotiate (ss. 45, 46, 49–51), or whose obligation has been discharged (ss. 62, 63). It is sufficient that the bill has been noted without the protest being extended. The formal protest may be extended at any time as of the date of noting (s. 93).

Partial Acceptance.—(2) A bill may be accepted for honour for part only of the sum for which it is drawn. Without the drawer's consent no other qualified acceptance can be taken by the holder.

Requisites.—(3) An acceptance for honour *supra* protest, in order to be valid (s. 50 (7–8)), must (*a*) be written on the bill and indicate that it is an acceptance for honour; (*b*) be signed by the acceptor for honour. No special form of words is necessary. The form usually adopted is, "accepted for the honour of *A. B. supra* protest," or simply "accepted *S. P.*," and signed. Prior to the Act it was necessary that an acceptance for honour should be made in the presence of a notary, and that an act of honour (for form, *see* beginning of this article) should be executed recording the transaction. When the bill was in Committee, a clause requiring this to be done was struck out, so probably the executing of the notarial act of honour is no longer compulsory. (4) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

Maturity of Bill.—(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.

66. *Liability of Acceptor for Honour.*—(1) The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented (ss. 52 (1), 67 (2)) for payment (s. 45) (unless excused, s. 46), and protested for non-payment, and that he receives notice of these facts. The notice, which should be given at or before the time of presentment for payment, need not be in writing, but must be in such terms as to sufficiently identify the bill (s. 49). (2) The acceptor for honour is liable to the holder and to all parties on the bill subsequent to the party for whose honour he has accepted. Any defence competent to an acceptor is also competent to the acceptor for honour (s. 54).

67. *Presentment for Payment to Acceptor for Honour.*—(1) Where a dishonoured bill has been accepted for honour *supra* protest (s. 65), or contains a reference in case of need (s. 15), it must be protested for non-payment (s. 51 (4, 6–9)) before it is presented for payment to the acceptor for honour or referee in case of need. It is not necessary to extend the protest, noting being sufficient.

Place and Time of Presentment.—(2) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him. Non-business days are excluded (s. 92).

Delay in Presentment.—(3) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (s. 46).

Protest for Non-Payment.—(4) When a bill is dishonoured by the acceptor for honour, it must be protested for non-payment by him. Noting is sufficient (s. 93).

68. *Payment for Honour* supra *Protest.*—(1) Where a bill has been protested for non-payment (ss. 51 (4, 6–9), 94), any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn. A person who takes up a bill *supra* protest for the benefit of a particular party succeeds to the title of the person from whom, not for whom, he receives it, and has all the title of such person to sue upon the bill, except that he discharges all the parties subsequent to the one for whose honour he accepts, and that he cannot himself endorse it over. The consent of the holder, as in the case of acceptance for honour, is unnecessary, and the drawee, before acceptance or after acceptance, if with the assent of the drawer and endorsers the acceptance be conditional, may, if the condition be not fulfilled, pay for the honour of any party liable on the bill. The payment must be on behalf of a person already liable on the bill, and not for such a person as, for example, an endorser who has endorsed without recourse (s. 16) in a representative character or as an agent (s. 26), nor for a person who through any cause (ss. 45, 46, 49, 50, 51, 62, 63) has ceased to be liable before such payment is made.

Preference of Payer.—(2) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill is entitled to the preference. A payment for the honour of the acceptor is preferable to one for the honour of the drawer, and a payment for the honour of the drawer to one for the honour of an endorser, and of a prior to a later endorser.

Notarial Attestment of Payment.—(3) Payment for honour *supra* protest, in order to operate as such, and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest, or form an extension of it (for form, *see* beginning of this article). (4) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf (who, in order to pay and take the necessary steps to preserve his principal's right of recourse against the person for whose honour the payment is made, must be specially authorised to do so), declaring his intention to pay the bill for honour, and for whose honour he pays.

Effect of Payment.—(5) Where a bill has been paid for honour, all parties subsequent to the person for whose honour it is paid are discharged; but the payer for honour is subrogated for and succeeds to both the rights and duties of the holder as regards the person for whose honour he pays, and all parties liable to that party.

Payer Entitled to Delivery of Bill.—(6) The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up, he is liable to the payer for honour in damages.

Holder Refusing Payment.—(7) Where the holder of a bill refuses to receive payment *supra* protest, he loses his right of recourse (ss. 55–7) against any party who would have been discharged by such payment.

11. Lost Instruments.

69. *Holder's Right to Duplicate of Lost Bill.*—Where a bill has been lost before it is overdue (ss. 10, 14, 45), the person who was the holder of it may apply to the drawer to give him another bill (which, being a new contract, requires the appropriate stamp) of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer, on request as aforesaid, refuses to give such duplicate bill, he may be compelled to do so. In a question with the finder of the bill, the person in right of it has a good action for recovery of the instrument; but if it is in the possession of a holder in due course (s. 29) from such finder, no right of action for recovery against the holder exists. The person in right of the bill can recover from the finder whatever value he has received for it.

70. *Action on Lost Bill.*—In any action or proceeding upon a bill, the Court or judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question. Where a bill has been lost, and the holder chooses to sue for the value he gave for it, and not to found his action on the bill, he is nevertheless bound to give security to the satisfaction of the Court against other demands on the instrument, because the bill, if paid by the drawee, will be a complete discharge of the debt (*Haberley*, 1822, 1 S. 401; revd. 1825, 1 W. & S. (H. L. Appeals) 10.

Notwithstanding the loss of a bill, the holder is bound to take the steps incumbent upon him. Presentment for payment may be excused (s. 46 (1)) or dispensed with (s. 46 (2)) in certain cases, but the loss of the bill will not excuse delay in giving notice of dishonour, nor of protesting when necessary (s. 51 (8)).

12. Bills in a Set.

71. *Rules as to Sets* (for form, see beginning of article; *Stamp Duty, infra*).—(1) Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. If they be not so numbered, one part of the set becomes a separate bill in the hands of a *bonâ fide* holder for value. (2) Where the holder of a set endorses two or more parts to different persons, he is liable on every such part, and every endorser subsequent to him is liable on the part he has himself endorsed as if the said parts were separate bills. (3) Where two or more parts of a set are negotiated (s. 31) to different holders in due course (s. 29), the holder whose title first accrues is, as between such holders, deemed the true owner of the bill. Nothing in this subsection affects the rights of a person who in due course accepts or pays the part first presented to him (s. 59). (4) The acceptance may be written on any part, and it must be written on one part only (s. 17). If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill. (5) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity (ss. 10, 14, 45 (2)) is outstanding in the hands of a holder in due course, he is liable to the holder thereof. (6) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise (s. 17), the whole bill is discharged (ss. 59–64).

72 deals with *Conflict of Laws.*—See *infra*, INTERNATIONAL LAW, *Bills of Exchange.*

73 to **89** deal with CHEQUES and PROMISSORY NOTES (which see).

13. MISCELLANEOUS.

90. *Good Faith.*—A thing is deemed to be done in good faith within the meaning of the Act where it is, in fact, done honestly, whether it is done negligently or not. If a person has in his possession the means of knowing that a bill for which he is asked to give value has been stolen or otherwise fraudulently obtained, and the means of knowledge in his power are wilfully disregarded, he is not acting in good faith (*May*, 16 M. & W. 355; *Raphael*, 17 Scott. C. B. 174: *Jones*, 2 App. Ca. 616).

91. *Signature.*—(1) Where by the Act any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority (as to what is a sufficient signature, see *Forster*, 1869, L. R. 4 C. P. 704). (2) In the case of a corporation, where, by the Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal. But nothing in the section is to be construed as requiring a bill or note of a corporation to be under seal. (As to how bills of companies incorporated under the Companies Acts should be made, accepted, or endorsed, see The Companies Act, 1862 (25 & 26 Vict. c. 89, s. 47).) See also JOINT STOCK COMPANY.

92. *Computation of Time.*—Where by the Act the time limited for doing any act or thing is less than three days, in reckoning time non-business days are excluded. "Non-business days, for the purposes of the Act, mean (*a*) Sunday, Good Friday, Christmas Day; (*b*) a bank holiday under the Bank Holidays Act, 1871, or Acts amending it; (*c*) a day appointed by royal proclamation as a public fast or thanksgiving day. Any other day is a business day. (For bank holidays, *see* note on s. 14.)

93. *When Noting Equivalent to Protest.*—For the purposes of the Act, where a bill or note is required to be protested within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting. The following is the usual memorandum of noting put upon bills: "14/3/96. Pnp. (protest for non-payment) A. M'N., N.P.," or "14/3/96. Pnac. (protest for non-acceptance) A. M'N., N.P."

94. *Protest where Services of Notary cannot be Obtained.*—Where a dishonoured bill or note (ss. 43, 47) is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate in all respects operates as if it were a formal protest of the bill. The form which is scheduled to the Act and given at the beginning of this article, may be used with necessary modifications, and, if used, is sufficient.

95 deals with crossed CHEQUES and DIVIDEND WARRANTS (*q.v.*).

96 deals with repeal of certain Acts.

97. *Saving Clauses.*—(1) The rules in bankruptcy relating to bills, etc., continue to apply thereto notwithstanding anything contained in the Act. (2) The rules of common law, including the law merchant (for meaning of

term "law merchant," see beginning of this article), save in so far as they are inconsistent with the express provisions of the Act, continue to apply to bills. (3) Nothing in the Act, or in any repeal effected thereby, affects (*a*) the provisions of the Stamp Act, 1870, or Acts amending it, or any law or enactment for the time being in force relating to the revenue. The Stamp Act at present in force is 54 & 55 Vict. c. 39 (see STAMPS); (*b*) the provisions of the Companies Act, 1862, or Acts amending it, or any Act relating to joint-stock banks or companies; (*c*) the provisions of any Act relating to or confirming the privileges of the Bank of England or the Bank of Ireland respectively; (*d*) the validity of any usage relating to dividend warrants or the endorsements thereof.

98. *Summary Diligence.*—Nothing in the Act, or in any repeal effected thereby, extends or restricts, or in any way alters or affects, the law and practice in Scotland in regard to summary diligence. The existing enactments relative to summary diligence on bills are: 1681, c. 20; 1696, c. 36; 5 Geo. III. c. 49, ss. 4, 5, 6; 12 Geo. III. c. 72, ss. 36, 42, 43; 1 & 2 Vict. c. 114, ss. 1 and 9. See DILIGENCE.

99. *Construction with other Acts.*—Where any act or document refers to any enactment repealed by the Act, such Act or document is construed and operates as if it referred to the corresponding provisions of the Act.

100. *Parole Evidence Allowed in Certain Judicial Proceedings in Scotland.*—In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note which is relevant to any question of liability thereon, may be proved by parole evidence. This provision alters the common law on the subject. Under the common law, facts relevant to a question of liability on a bill were in general only capable of being proved by the writ or oath of the holder of the instrument. Since the passing of the Act, the question was raised but not decided (*National Bank of Australasia*, 1891, 18 R. 634) whether parole proof was competent to contradict the express obligations of the *immediate* parties to a bill by an allegation of a verbal understanding or arrangement that these obligations were to be subject to conditions not appearing on the face of the instrument. The Lord President (Inglis) and L. M'Laren expressed the view that parole evidence in such a case was incompetent, as it would be an attempt to substitute a different contract from that which was expressed in the written one. L. Adam, on the other hand, gave it as his opinion that if the drawer of a bill averred that there was a verbal agreement by which he was in no event to be liable for the bill, he would be entitled to prove this averment by parole. The case was decided upon other grounds, but the opinions of the three judges referred to are instructive, as containing to a certain extent an interpretation of the section. (See also Thorburn on the *Bills of Exchange Act*, 218.) The provision does not, however, affect the law and practice whereby the party who is, according to the tenor of any bill of exchange, cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence or suspension of a charge or threatened charge, to make such consignation, or to find such caution as the Court or judge before whom the cause is depending may require (*Simpson*, 1888, 15 R. 716). Further, the section does not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sexennial prescription (see PRESCRIPTION).

14. BILLS FOR SUMS OF LESS THAN TWENTY SHILLINGS.

Bills issued for less than the sum of twenty shillings in the whole are absolutely void and of no effect. Any person who negotiates or transfers

the same in Scotland is liable to a penalty not exceeding twenty pounds nor less than five pounds (8 & 9 Vict. c. 38, s. 16). This enactment was an extension to Scotland of the provisions of the English Act of 48 Geo. III. c. 88, ss. 2 and 3; and while the English Act has been repealed by the Bills of Exchange Act of 1882, the Scots Act has been omitted from the repealing schedule. The law, therefore, as regards Scotland, must still be taken to be regulated by the Act 8 & 9 Vict. c. 38, above referred to.

15. Privileges of Bills.

Bills are probative though not holograph nor granted *in re mercatoria*. They prove their dates without witnesses, and the designations of the drawer, acceptor, and endorsers are not essential.

16. Stamp Duty on Bills.

Inland notes of all kinds, and inland bills payable otherwise than on demand, must be drawn upon paper impressed with the appropriate stamp duty, and cannot be stamped after execution (Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 37)). The consent of parties will not obviate or remedy the objection. The following are the duties payable:—

Where the amount or value of the money for which the bill or note is drawn or made does not exceed £5 .	£0	0	1
Exceeding £5, not exceeding £10 . .	0	0	2
„ 10, „ 25 . .	0	0	3
„ 25, „ 50 . .	0	0	6
„ 50, „ 75 . .	0	0	9
„ 75, „ 100 . .	0	1	0
For every £100, and also for any fractional part of such amount, or value . .	0	1	0

As a bill is not invalid by reason only that it is post-dated or ante-dated (s. 13 (2)), it would appear that a bill executed on a paper bearing an impressed stamp of a date subsequent to that on which the bill appears to have been drawn, is nevertheless valid and effectual. A bill of exchange or promissory note written on material bearing an impressed stamp of sufficient amount, but of improper denomination, may, however, be stamped with the proper stamp on payment of the duty, and a penalty of forty shillings if the bill or note be not then payable according to its tenor, or of ten pounds if it be so payable (Stamp Act, *supra*, s. 37). Every person who issues, endorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty which is not duly stamped, is liable to a fine of ten pounds; and any person who takes or receives such a bill or note from any other person in payment, security, by purchase or otherwise, is not entitled to recover upon it, or to make it available for any purpose whatever. It has been held that an averment that when originally presented for payment in the United Kingdom a foreign promissory note was unstamped, was irrelevant, since presentation without a stamp did not involve nullity (*Brodielius*, 1887, 14 R. 536).

Bills Payable on Demand.—The duty on a bill of exchange payable on demand (s. 10) may be denoted by an adhesive stamp. If the bill be drawn in the United Kingdom, the stamp must be cancelled by the person who signs the bill before he delivers it out of his hands, custody, or power. If any such bill is presented for payment unstamped, the person to whom it is presented for payment unstamped may affix thereto an adhesive stamp of one penny, and cancel the same as if he had been the drawer of the bill, and may thereupon pay the sum mentioned in the bill, and charge the duty

in account against the person by whom the bill was drawn, or deduct the duty from the said sum. The bill is then, so far as respects the duty, deemed to be valid and available. This provision does not, however, relieve any person from any fine or penalty incurred by him in relation to such bill (Stamp Act, *supra*, s. 38).

Foreign Bills.—Every person into whose hands any bill or promissory note, drawn or made out of the United Kingdom, comes in the United Kingdom before it is stamped, must, before he presents for payment, endorses, transfers, or in any manner negotiates or pays the bill or note, affix thereto a proper adhesive stamp or stamps of sufficient amount, and cancel every stamp so affixed thereto (*Crofton*, 33 Ch. D. 612). But if at the time when any such bill or note comes into the hands of any *bonâ fide* holder there is affixed thereto an adhesive stamp effectually cancelled, the stamp is, as regards the holder, deemed to be duly cancelled, although it may not appear to have been affixed or cancelled by the proper person. If the stamp be not cancelled when the bill or note comes into the hands of a *bonâ fide* holder, it is competent for such holder to cancel the stamp as if he were the person by whom it was affixed; and upon his so doing, the bill or note is deemed duly stamped, and as valid and available as if the stamp had been cancelled by the person by whom it was affixed. These provisions, however, do not relieve any person from any fine or penalty incurred by him for not cancelling an adhesive stamp (Stamp Act, *supra*, s. 35).

Bills in a Set.—When a bill of exchange is drawn in a set according to the custom of merchants, each part of the set being numbered and containing a reference to the other parts, and one of the set is duly stamped, the other or others of the set are, unless issued or in some manner negotiated apart from the stamped bill, exempt from duty. If they be not numbered, each bill requires a separate stamp. Upon proof of the loss or destruction of a duly stamped bill forming one of a set, any other bill of the set which has not been issued or in any manner negotiated apart from the lost or destroyed bill may, although unstamped, be admitted in evidence to prove the contents of the lost or destroyed bill (Stamp Act, *supra*, s. 39).

Stamp Duty on Protest.—The stamp duty on the protest of a bill or promissory note may be denoted by an adhesive stamp, which must be cancelled by the notary (Stamp Act, *supra*, s. 90). Where the duty on the bill or note does not exceed one shilling, the duty on the protest is the same as on the bill or note. In any other case the duty is one shilling.

Banker's Duty towards Customers' Acceptances.—See BANK; BANKER.

Bills, Sexennial Prescription of.—*The Statute.*—The Statute 12 Geo. III. c. 72, s. 37 (made perpetual by 23 Geo. III. c. 18, s. 55), upon the preamble that "the not limiting bills and promissory notes to a moderate endurance in that part of Great Britain called Scotland has been found by experience to be attended with great inconveniences," enacts "that no bill of exchange, or inland bill, or promissory note executed after the 15th day of May 1772, shall be of force, or effectual to produce any diligence or action in that part of Great Britain called Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes become exigible. . . . (s. 39). Provided always that no notes commonly called bank notes or post bills issued or to be issued by any bank or banking company, and which contain an obligation of payment to the bearer, and are circulated as money, shall be compre-

hended under the aforesaid limitation or prescription; and that it shall and may be lawful and competent, at any time after the expiration of the said six years, in either of the cases before mentioned, to prove the debts contained in the said bills and promissory notes, and that the same are resting and owing, by the oaths or writs of the debtor."

This enactment, designed to extend to Scotland the benefits of the Statute of Limitations (21 James I. c. 16), is obviously modelled upon the Act 1579, c. 83, which established the TRIENNIAL PRESCRIPTION (*q.v.*) of "merchants' accounts," etc.; and very similar questions have arisen upon the interpretation of both Statutes.

Effect of the Statute.—The Statute deals solely with actions raised upon bills, and therefore has no application to the claim of one who has signed an accommodation bill for another against that other (*Jolly*, 1829, 7 S. 666), nor to any claim of relief such as that of the acceptor against the drawer (*Ralston*, 1792, Mor. 1533). It introduces no presumption as to the payment of a bill, but enacts certain specific and imperative rules on the subject of probation. It limits the mode of proof in a particular manner, and entirely shifts the *onus probandi* from the apparent debtor in the bill to the apparent creditor. During the six years the bill proves itself, the burden of disproving value or of proving payment lies on the debtor, and proof is limited to the writ or oath of the holder. After the lapse of six years, the burden of proving "the debt contained in the bill" and "that it is resting and owing," is laid upon the holder of the bill, and proof is limited to the writ or oath of his adversary (*Darnley*, 1845, 7 D. 595). Nothing can avoid or elide this statutory prescription except what the Statute itself provides, namely, action or diligence commenced or done upon the bill or note within the six years; and nothing can be done by the debtor or creditor after the six years have expired which will give the bill force or effect as a ground of action (*Scott*, 1828, 7 S. 192; *Stirling*, 1830, 8 S. 638) or diligence (*Armstrong*, 1804, Mor. 11140). The bill, in short, is put an end to as a document of debt, and its resting owing must be proved otherwise than by the mere production of the bill (*Campbell's Trs.*, 1895, 22 R. 943). Consequently, the endorsation of a prescribed bill is worth nothing and conveys nothing (*Kerr's Trs.*, 1883, 11 R. 108), nor is a prescribed bill a sufficient voucher of a claim in a sequestration to entitle the claimant to vote at the election of a trustee (*Lockhart*, 1849, 11 D. 1341; see, too, *Nisbet*, 1856, 18 D. 1042). A charge following on a decree pronounced in absence upon a prescribed bill may probably be suspended by the debtor without caution or consignation (Bell, *Com.* i. p. 419; see *M'Nicol*, 1821, 1 S. 166); but a prescribed bill may be founded on by way of defence to an action of accounting (*Hall*, 1837, 16 S. 263).

The Bill an Adminicle of Evidence.—In practice, however, the words of the Statute have so far received a reasonable qualification, that parties have been permitted, even after the lapse of the six years, to set forth the bill in their summons; because, as the "debt contained in the bill" might be proved after the lapse of six years, a reference to the bill *descriptione* was almost unavoidable. In more than one case it has even been held that a prescribed bill was competently libelled on (*Ettler*, 1833, 11 S. 397; *Christie*, 1833, 11 S. 744). At all events, the bill may be produced in the way of adminicle or documentary evidence, though the proof on which alone judgment can proceed is the writ or oath of the debtor (Bell, *Com.* i. 419); and this proposition has recently been reaffirmed by a majority of the Second Division (*Campbell's Trs.*, *ut supra*). The Statute does not annihilate the bill as a subsisting writing. On the contrary, it expressly

recognises it as the original voucher of a debt which may still be proved: while it limits the proof by which alone the debt can now be instructed. Reference to the bill, so far from derogating from the character of any writings produced to establish the debt, will only tend to confirm the existence of the obligation (*Nisbet*, 1869, 7 M. 1097). Both practice and authority, indeed, seem to show that, whether the pursuer found upon the bill or upon the debt contained in the bill, he will be well advised to refer to the bill in his summons (*Drummond*, 1848, 10 D. 340, per L. Jeffrey, 352; *Hunter*, 1843, 5 D. 1285; and *Milne's Trs.*, 1893, 20 R. 523).

"*Interruption*" *of Prescription.*—To preserve a bill from the operation of prescription,—to "interrupt" the course of prescription, as it is commonly called,—diligence must be "raised and executed," or an action "commenced," upon the bill within the sexennium. The precise effect of "interruption" is a matter of some moment. Whether it entitles the holder of the bill not merely to complete an action or diligence already begun, but to raise other actions and execute other diligence *after* the six years, or whether the meaning of the Statute is not plainly this, that if action is commenced or diligence used within the six years, the expiry of that term shall not interfere with the action so commenced or the diligence so used, is a question which seems to invite discussion. There can be no doubt that the former view is supported by the great mass of authority. Decisions and expressions of opinion, such as those to be found in *M'Lachlan*, 1831, 9 S. 753; *Main*, 1839, 1 D. 722; *Paxton*, 1842, 4 D. 1515; *Denoran*, 1845, 7 D. 378; *Roy*, 1850, 12 D. 1028, and other cases referred to below, unequivocally proceed upon the footing that diligence or action saves a bill from prescription in the sense not merely of enabling the holder to complete action or diligence which he has begun, but also of making the bill capable of being the foundation of action or diligence begun after the six years. In *Milne's Trs.*, 1893, 20 R. 523, two of the judges of the Second Division thought that the question was no longer open; but L. Rutherfurd Clark expressed grave doubts as to whether the accepted view of the law was sound, while L. Young expressly supported an interpretation which, it is thought, adheres much more closely than the other to the language of the enactment.

Whatever the effect of interruption may be, nothing short of action or diligence is effectual to cause it.

Diligence.—Diligence must be complete. A threatened charge, even when suspended by the debtor, will probably not suffice to exclude prescription (Bell, *Com.* i. 419); but a charge given upon a bill, though not followed up by further diligence within the sexennium, will be sufficient (*Fraser*, 1831, 9 S. 723).

Action.—To exclude prescription, an action must be at the instance of the creditor in the bill (*Arbuthnot*, 1795, Mor. 11133): the bill must be expressly libelled on (*Gordon*, 1784, Mor. 11127); nor can the action be held to have been "commenced" unless the summons and execution are formal and complete (*Baillie*, 1790, Mor. 11286). But when once the action is commenced, the mere allowing it to go to sleep will not destroy its efficacy as an interruption of prescription (*Denoran*, 1845, 7 D. 378). The term action is taken to mean the preferring of a claim in any process in which legal effect can be given to it, and to include many kinds of judicial, or quasi-judicial demands, *e.g.* the production of the bill as a ground of claim in any process of competition, such as a multiplepoinding (*Lindsay*, 1854, 16 D. 600), or a ranking and sale (*Douglas, Heron, & Co.*, 1784, Mor. 11127), or sequestration, even though the sequestration be recalled (Bankruptcy

Act, 1856 (19 & 20 Vict. c. 79), s. 107). So, too, the founding on a bill by way of defence (cf. *Macdonald*, 1826, 5 S. 28) or of compensation seems to preserve it from prescription (*Ross*, 1855, 17 D. 1144). The plea of prescription is also barred by the entering of the debtor into a special submission on the bill in question (*Vans*, 14 June 1816, F. C.). Whether judicial proceedings commenced on a bill in England exclude prescription or not, seems doubtful.

Decree taken within the sexennium against one of several co-obligants in a bill, precludes the others from pleading prescription (*Gordon*, 1784, M. 11127); and the production of a bill in a multiplepoinding for distributing the effects of one member of a co-partnery is sufficient interruption to entitle the holder to raise an action on the bill after the six years against another partner (*National Bank*, 1837, 16 S. 177). Interruption against two of several heirs-portioners has been held to be interruption against the others (*Paxton*, 1842, 4 D. 1515); and interruption against an endorser (*M'Lachlan*, 1831, 9 S. 753), or the acceptor of a bill (*Roy*, 1850, 12 D. 1028), to be interruption against the drawer.

No mere admission of the debt within the sexennium will keep the bill alive. The protesting of a bill, and registering of the protest (*Scott*, 1828, 7 S. 192); the execution of a private trust deed by a debtor for behoof of creditors, and their consent thereto (*Blair*, 1858, 21 D. 45); the emitting by the creditor of an affidavit affirming the verity of the debt in a private composition-contract (*Watson*, 1822, 1 S. 371); the entering of the debtor into a general submission of his debts (*Garden*, 1743, Kilk. *Prescr.* 11)—will not exclude the operation of prescription. (See also *Ewing*, 1835, 14 S. 1; *M'Nicol*, 1821, 1 S. 166; *Hunter*, 1831, 9 S. 703; 1832, 6 W. & S. 206; *Buchanan*, 1840, 2 D. 1444.) The raising of an incompetent action (*Cochran*, 1841, 4 D. 76), or of a competent action which is subsequently abandoned (*Gobbi*, 1859, 21 D. 861), probably does not constitute an interruption: nor does an application for a *meditatione fugæ* warrant (*Boag*, 1849, 11 D. 362), or the death of the creditor (*Cullen*, 1853, 15 D. 868).

Proof of the Debt in the Bill.—When prescription is applicable, it is, nevertheless, open to the creditor "to prove the debts contained in the said bills and promissory notes, and that the same are resting and owing, by the oaths or writs of the debtor." It is not enough for the holder merely to establish the genuineness of the acceptor's signature; he must prove that value was given for the bill: that there was, and still subsists, a legal obligation to pay the sum mentioned in the bill. To hold that the mere fact of an acceptor acknowledging his subscription after the lapse of six years revives all the privileges and presumptions attaching to the document before the lapse of the prescriptive period, would be to defeat the declared object of the Statute. The expression, "the debt contained in the bill," cannot mean the obligation created by the bare fact of signing the bill. The words must be held to mean the debt, or the sum of money, independently of the bill, in liquidation or evidence of which the bill was granted. When a bill is granted in payment of a debt previously due, the existence of that previous debt must be proved by the writ or oath of the alleged debtor. On the other hand, there may be no previous debt, the debt may be one constituted by discounting the bill, and the bill may be granted in consideration of a sum then advanced: in that case the actual advance of the money, being the circumstance creating the debt, must be proved in terms of the Statute. The debt need not be proved to have existed prior to the granting of the bill (*Drummond*, 1848, 10 D. 340;

Campbell's Trs., 1895, 22 R. 943). On these principles, if it appears from the defender's oath that the bill was granted for a debt arising from an illegal transaction (*e.g.* had been illegally impetrated, or had been granted for a gaming debt), the pursuer will fail to make good his case (*Clarkson's Trs.*, 8 June 1820, F. C.; cf. *Campbell's Trs., ut supra*, per L. Young): and he will also fail if it is proved in the statutory manner that the defender signed the bill, believing it to be a receipt (*Fraser*, 27 June 1809, F. C.), or for one purpose, while the holder applied it to another (*Drummond, ut supra*).

Constitution of the Debt.—With regard to the constitution of the debt in the bill, it makes no difference, if it be once proved that value was given for the bill, whether that value was received by the acceptor or by his friend on the faith of his subscription (*Philp*, 1800, M. *cove* Bill, App. 13; *M'Neill*, 1825, 3 S. 459; *Laidlaw*, 1826, 4 S. 636; *Wilson*, 1830, 8 S. 625; *Boyd*, 1852, 15 D. 342). In one case, indeed, where the acceptor of an accommodation bill deponed that he had signed a prescribed promissory note together with a joint obligant, but that the holder had stated at the time that it would never form a debt against him, it was held that constitution had not been proved (*Baird*, 1827, 5 S. 820). But there the bill was not in the hands of an onerous endorsee, against whom such a deposition would probably be vain.

Resting-Owing of the Debt.—The resting-owing, as well as the constitution, of the debt must be proved in terms of the Statute. Accordingly, a writ, granted within the six years, acknowledging the subsistence of the debt, is valueless (*Buchan*, 1787, Mor. 11128; *Allan*, 1817, Hume, 477) unless it amounts to a reconstitution of the debt, or founds a distinct and separate obligation from the bill (*Russell*, 1792, Mor. 11130; *M'Tavish*, 1825, 3 S. 472; *Blair*, 1859, 21 D. 1004; *Blake*, 1860, 23 D. 15).

Writ of the Debtor.—To instruct the constitution and resting-owing of the debt, the writing of the debtor need not be probative, nor need it disclose the specific sum given in consideration of the bill (*M'Gregor*, 1860, 22 D. 1264). A letter written by the debtor, or markings of payment of interest in his hand, after the six years, and acknowledging the debt either expressly or by implication, is sufficient (*Russell*, 1792, Mor. 11130; *Mackenzie*, 1827, 5 S. 367; *Elder*, 1830, 9 S. 133). But the letter must be capable of being connected with the debt in the bill (*Blair*, 1859, 21 D. 1004), though, if the writing founded on admits a debt to be due, it will probably be referred to the bill if no allegation is made of any other debt to which it can apply (*Fiske*, 1860, 22 D. 1488). If there be such an allegation, it seems that the pursuer may prove the connection of the writ with the debt sued for *prout de jure* (*Stevenson*, 1849, 11 D. 1086). Entries of payments in the debtor's books in the hand of his clerk, and acknowledgments by the factor or agent of the debtor that the debt was due, have been held equivalent to writ of the debtor (*Black*, 1823, 2 S. 118; *Campbell*, 1839, 1 D. 1061; *M'Gregor*, 1860, 22 D. 1264). Nay, letters or receipts in the *creditor's* handwriting, found in the repositories of the debtor, have been held to be, constructively, the debtor's own writ, they having been received and preserved by the debtor as his own proper vouchers (*Wood*, 1843, 5 D. 507: *Rennie*, 1880, 7 R. 1030: *Campbell's Trs.*, 1895, 22 R. 943). It must be borne in mind that, in all such cases, much depends on the terms of the particular writing under consideration, and that it is an indispensable step in the proof to connect the documents founded on with the debt contained in the bill (*Cowper*, 1849, 12 D. 190; *Watson*, 1841, 3 D. 583; *Wood*, 1843, 5 D. 507; *Campbell's Trs., ut supra*).

Oath of the Debtor.—Failing writ, the creditor must establish the debt

by the oath of the debtor. The procedure in the case of the sexennial prescription is similar to that in any REFERENCE TO OATH (*q.v.*); and it is only necessary to point out the two conflicting tendencies disclosed by the decisions: the one to hold that a defender is not entitled to get off with a mere *nihil novi* or *nihil memini*; the other to abide closely by the language of the Statute, and to remember that the real question at issue is, not whether the defender has paid his debt, but whether the pursuer has discharged the burden of proof in the statutory manner. Illustrations of the former tendency may be found in *Stewart*, 1823, 2 S. 483, and *Paul*, 1841, 3 D. 874; of the latter—which, it is thought, is the more correct—tendency, in *Stirling*, 11 March 1817, F. C.; *Robertson*, 1830, 8 S. 810; *Fyfe*, 1841, 4 D. 152; and *Mackay*, 1849, 11 D. 982.

It is impossible in this place to discuss in detail the nice distinctions which assist in determining whether, when the debtor's oath is qualified, the qualification is intrinsic or extrinsic. The question, *Quid juratum est?* must be answered with reference to the terms of each separate oath; and it must suffice to cite *Robertson*, 1784, M. 13244; *Williamson*, 11 Dec. 1810, F.C.; *Brown*, 1828, 6 S. 1022; *Macdonald*, 1834, 12 S. 533; *Stevenson*, 1838, 16 S. 1088; *Black*, 1838, 16 S. 1220; *Stewart*, 1852, 15 D. 12; *Thomson*, 1855, 17 D. 1081; and *Balfour*, 1873, 11 M. 604, as examples of extrinsic quality; *Agnew*, 1782, M. 13219; *Fraser*, 27 June 1809, F. C.; *Baird*, 1827, 5 S. 820; *Young*, 1837, 15 S. 664; *Galloway*, 1845, 7 D. 1088; *Drummond*, 1848, 10 D. 340; and *Gordon*, 1860, 22 D. 903, as examples of intrinsic quality; and to refer generally, on the subject of the interpretation of oaths on reference, to the judgment of L. Deas in *Coubrough*, 1879, 6 R. 1301, a case which arose on the triennial prescription.

Joint Obligants and Partners.—When the six years have expired, a bill ceases to be *unum quid*, and consequently the writ or oath of one of several joint obligants in a bill is evidence only against himself, and not against his co-obligants (*Allan*, 1817, Hume, 477; *Houston*, 1822, 1 S. 449; *M'Neill*, 1823, 2 S. 174; *M'Indoe*, 1824, 3 S. 295). The case of *Christie*, 1833, 11 S. 744, where the decision proceeded upon the opposite view, was decided by a bare majority, and is of very doubtful authority. So, too, where the oath of one of the obligants negatives the constitution of the debt, he is entitled to immediate absolvitor, without waiting for the result of the reference to the others (*Easton*, 1831, 9 S. 440). On the same principle, when a company has been dissolved, the debt cannot be constituted against the company by the oath of one partner (*M'Nab*, 1843, 5 D. 1014); nor against one partner, if he is sued for the debt, by the oath of another (*Neil*, 1849, 11 D. 979). But where the management of the business of the company has been wholly delegated to one partner, reference to the oath of that managing partner seems to be sufficient (*Gow*, 1827, 5 S. 472); and the writ of a partner granted during the existence of the company, in connection with its legitimate business, will probably bind all the partners in an action brought against them after its dissolution (*Nisbet's Tr.*, 1829, 7 S. 307).

Debtor's Representative.—When the creditor is unable, owing to the death of the debtor, to refer to his oath, he may refer to the oath of the debtor's representative, from whom the Court will probably be more willing to take a mere *nihil novi* as conclusive against the claim of the creditor than from the debtor himself (see *Stirling*, 11 March 1817, F. C.). Reference has been permitted to the oath of the debtor's testamentary trustees (*Murray*, 1827, 5 S. 515), but it was doubted whether, supposing their oath to be negative of the debt, the creditor would be precluded from a reference

to the oath of the heir when he attained majority. The question whether the oath of a trustee or executor is absolutely binding on the debtor's estate, or whether it is only binding if and in so far as the trustee or executor himself is beneficially interested therein, was discussed but not decided in *Wood*, 1843, 5 D. 507. The analogy of *Briggs*, 1854, 16 D. 385 (approved in *Mounsey*, 1896, 33 S. L. R. 438), suggests that in the case of an executor the second alternative is the correct one. It has also been considered but not determined how far a husband's writ will prove the debt in a bill granted by his wife (*Barclay*, 1846, 8 D. 548).

Judicial Admission.—At one time there was a tendency to hold that unless the alleged debtor's pleadings contained a denial of the constitution of the debt, or a distinct averment of payment, he must be taken as having acknowledged constitution and resting-owing, and therefore was not entitled to insist upon a reference to his oath, on the principle that a party cannot be allowed to maintain that he means to deny on oath what on record he has admitted to be true. But since *Alcock*, 1842, 5 D. 356; *Noble*, 1843, 5 D. 723; and *Darnley*, 1845, 7 D. 595, it has been settled law that, to supersede the necessity of a reference to the debtor's oath, a judicial admission made by him must be express, deliberate, and unequivocal—such admission as, if made on oath, would have proved the pursuer's case: that the defender's statements on record must be looked to and considered as a whole, and that mere inferences from, and legal constructions of, isolated statements are not sufficient.

The Debt and not the Bill established.—When the debt has been established in the statutory manner, it is now settled that the bill is not raised up for another period of six years, but that the debt is raised up so as to be affected only by the long negative PRESCRIPTION (*q.v.*) (*Drummond*, 1880, 7 R. 452).

Limitations of the Prescription.—The Statute 1772, c. 72, s. 40, enacts that "the years of the minority of creditors in such notes or bills shall not be computed in the said six years." This exception is available to any endorsee to whom the bill is endorsed within the sexennium, but it is only the minority of an actual creditor which can be pleaded. Trustees who are the true creditors on a bill cannot plead the minority of the beneficiaries under the trust (*M'Neil*, 1823, 2 S. 174). But where the exception may be pleaded, full effect will be given to it, and the vitality of a bill will probably be preserved throughout the whole minority of the representative of a creditor, unless there be very strong evidence of payment (*Patrick*, 1859, 21 D. 637).

The fact that the debtor in a bill has, during the whole or a part of the prescriptive period, been in outlawry, will have no effect on the currency of the prescription (*Brodie*, 20 Feb. 1821, F. C.).

Terminus a quo.—The sexennial prescription runs from the date at which the debt in the bill becomes exigible: (1) from the last day of grace in a bill payable on a named day, or so many days or months after date (*Douglas, Heron, & Co.*, 1793, Mor. 4602): (2) from the date of the bill in a bill payable on demand (*Stephenson*, 1807, M. *voce* Bill, App. 20), or in a bill payable at sight (45 & 46 Vict. c. 61, s. 10): and (3) from the last day of the second, third, or fourth month, as the case may be, after the demand for payment has been made, in bills payable two, or three, or four months after notice (*Broddelius*, 1887, 14 R. 536).

International Law.—The case of *Don* v. *Lippman* (1837, 2 S. & M'L. 682) established the proposition that the sexennial prescription belongs *ad litis ordinationem*, and not *ad litis decisionem*: that consequently its

application is governed by the *lex fori* in which redress is sought; and that where the acceptor of a bill drawn and accepted in a foreign country is sued upon it in the Scottish Courts, the Statute setting up the sexennial prescription must be given effect to. (But see Guthrie *apud* Savigny, p. 269.)

[Ersk. *Inst.* ii. 7. 29: Bell, *Com.* i. 418: Bell, *Prin.* ss. 594–9; More *apud* Stair, II. cccxxii.: Thomson on *Bills*, 457; Dickson on *Evidence*, ss. 433–71 (424–63): Napier on *Prescription*, 822–50; Millar on *Prescription*, 161–77.]

Bills of Exchange—Ranking on Bills in Bankruptcy.—The general rule is that the holder is entitled to rank on the estates of the drawer and the acceptor, if both are bankrupt, for the full sum in the bill in each case, to the extent of drawing 20s. in the £ in all. Payments to account received before the date of a particular bankruptcy must be deducted in ranking upon that bankrupt estate; payments after bankruptcy are not deducted. It is not settled whether a dividend declared, but not paid, from the estate of one co-obligant before the bankruptcy of another, falls to be deducted in ranking on the estate of the latter (Bell, *Com.*, 5th ed., ii. 339; Goudy on *Bankruptcy*, 594). The right of the holder of a bill to rank for the full amount is not restricted by his having acquired it for a less sum. It seems to be otherwise, however, if he have acquired it after the date of the bankruptcy from a person who could not have claimed a ranking for the full amount (Goudy on *Bankruptcy*, 600). Where a debtor, in exchange for a loan of £300, gave his creditor in security of the debt a bill for £2000, signed by himself and four others who were known to be cautioners, it was held that the creditor could not rank on the bankrupt estate of one of the cautioners for more than £300, being the true amount of the debt (*Jackson*, 1875, 2 R. 882: see *Peek*, 1849, 12 D. 122). A holder in due course of such a bill would, however, be entitled to rank for the full amount thereof. If a bill representing a true debt, or, at least, granted by parties not known to be cautioners, is given in pledge by a debtor holding the bill to a creditor in part security of a debt, and the debtor becomes bankrupt, the creditor, notwithstanding he thereafter receives full payment of the impledged bill, is entitled to rank for the full amount of his claim on his debtor's estate, to the effect of receiving 20s. in the £, and is not bound to communicate to the bill debtor any dividends or composition drawn by him short of such full payment. Thus, where four bills of £200 each, held by A., were pledged by him in security of a debt of £800 which he was due to B., and, A. having become bankrupt, three of these bills were paid in full to B. by the debtors therein, while the fourth was only in part paid by a dividend from the granter's insolvent estate, it was held that B. was still entitled to rank for £800 on A.'s estate to the extent of obtaining full payment, and that until he received full payment he was not bound to communicate compositions drawn by him from A.'s estate to the three bill debtors who had paid their respective bills in full (*Black*, 1840, 2 D. 706; see *Jackson*, *supra*).

Ranking on Accommodation Bills.—A holder for value of an accommodation bill is entitled to rank in bankruptcy upon the estates of each of the parties to the bill, to the extent of drawing 20s. in the £ in all (*Anderson*, 1876, 3 R. 608; *ex parte Bloxham*, 6 Ves. 449). The party who has lent his name for accommodation stands in the position of a cautioner towards the party accommodated, and his right to rank on

the latter's estate is regulated accordingly. If he pays the bill, he is entitled to rank in the creditor's place for the amount; or if the debt be not yet due, and the holder have not claimed, he may obtain a contingent ranking to the effect of having a dividend set aside for him. There can be no double ranking of both the holder and the cautioner. But if the latter have in his hands funds or property belonging to the party accommodated, which have been specially appropriated for his indemnification, then, if both parties become bankrupt, and the holders rank on each estate, the trustee of the party holding the securities is entitled to apply them in recouping the estate the amount of dividends paid by him on the bills. If there be a surplus after so applying the securities, it falls to be handed over to the estate of the owner (*Royal Bank*, 1881, 8 R. 805, and 9 R. (H. L.) 67). In England, the rule in such circumstances is that the bill-holders are entitled to claim the securities and apply them towards payment of their claim, and then to rank for the balance. It is considered that the estate holding the securities loses the right to use them by its failure to take up the bills. This is known as the rule of *ex parte Waring*, 19 Ves. 345; *Powles*, 3 De G. M. & G. 430; *City Bank*, L. R. 5 Ch. App. 773; *Banner*, L. R. 5 E. & I. App. 174; *re Barned's Banking Co.*, L. R. 10 Ch. App. 198.

The Scotch rule above stated has been held not to apply where the cautioner has in his hands funds belonging to the party accommodated but not appropriated as security against his liability on the bill. In these circumstances, where the bill-holder has ranked both on the estate of the party accommodated and on the estate of the cautioner, the rule against double ranking precludes the trustee on the latter estate from pleading retention of such general debt against the dividends paid from that estate to the bill-holder (*Anderson, ut supra*; *Mackinnon*, 1881, 9 R. 393. Cf. *Christie*, 1838, 16 S. 1224).

Cross Accommodation Bills. — Where bills are exchanged for mutual accommodation, the general rule is that they form good consideration for each other; and if the bills have not been discounted, they are extinguished *hinc inde* (Bell, *Com.* ii. 421). It may be otherwise where the bills have not been exchanged as counterparts, but have crossed by means of separate transactions with third parties (*Curtis*, 1794, Mor. 2589; revd. H. L. 1797, 3 Pat. 540; Bell, *Com.* ii. 423; see Thomson on *Bills*, 586; and *Christie*, 1838, 16 S. 1224, per L. Mackenzie). If bills mutually exchanged have been discounted on one side, the holder can rank on both estates, and no further ranking is competent (Bell, *Com.* ii. 423; *Newbigging*, 1823, 2 S. 427; *Gibb*, 12 May 1838, F. C., and 16 S. 1002). If they have been discounted on both sides, the holders can rank on each estate to the full extent, and there can be no ranking of one estate against the other (*Anderson, ut supra*). A solvent party to the bills who takes up both sets of bills can rank on the bankrupt estate of the other party only for the bills on which the latter was acceptor (*Newbigging, supra*). Where both parties to the bills are bankrupt, and one is due a separate debt to the other, retention of such debt against dividends paid by the estate of the former upon acceptances of the latter, is excluded by the rule against double ranking (see *Mackinnon, supra*). But this only holds good where there is a proper bankruptcy of the party who is creditor in the separate debt involving divestiture of his estate. Thus it does not apply where he compounds with his creditors without divestiture (*Gibb, supra*; *Mackinnon, supra*).

[Goudy on *Bankruptcy*, 600–6; Bell, *Com.* ii. 420 *et seq.*]

Bill of Health, or **Sick Bill**—The application by an imprisoned debtor for liberation on the ground of sickness, addressed to the magistrates in royal burghs as the keepers of the prison.—It was made under the Act of Sederunt, 14 June 1671, which, while practically declaring the common law, was framed to correct the laxity and diversity of procedure which had grown up. The Act provided "that albeit by the law magistrates of burghs are obliged to detain in sure ward and firmance persons incarcerate in their tolbooths for debt, yet hitherto they have been in use to indulge prisoners to go abroad on several occasions . . . . therefore the Lords declare that hereafter it shall not be lawful to the magistrates of burghs, upon any occasion whatever, without a warrant from the Privy Council or the Lords of Session, to permit any person incarcerated in their tolbooth for debt to go out of prison, except only in the case of the party's sickness and extreme danger of life, the same being always attested upon oath under the hand of a physician, surgeon, or minister of the gospel in the place, which testificate shall be recorded in the town Court Books (but see *Emond*, 1835, 14 S. 124); and in that case that the magistrates allow the party only to reside in some house within the town during the continuance of his sickness, they being always answerable that the party escape not, and upon his recovery to return to prison." The Act further declared that the magistrates contravening its provisions should be liable for the debt.

The procedure was by petition to the magistrates (*Goodsir*, 1829, 7 S. 351), with the accompanying certificate, which had to be upon oath (*Fullerton*, 1781, Mor. 11755; *Bell*, 1825, 4 S. 306; but cf. *Forbes*, 1791, Mor. 11762, and *Emond*, *ut supra*), and which obviated the necessity for a proof. It was unnecessary to intimate the application to the incarcerating creditor (*Emond*, *ut supra*). Stair (iv. 47. 22) was of opinion that the magistrates, in granting the warrant to liberate, ought to choose the place of the prisoner's abode, "and have the guards attending," since they were responsible for his re-incarceration. But the practice in the burghs varied as to the restraints imposed: in some the magistrates did not fix any house within the burgh for the debtor's residence; in others they were in use, without incurring liability for the debt, to fix on the debtor's own house, even beyond burgh (*Gillies*, 1843, 5 D. 512); while it was not the practice anywhere to keep a guard on the liberated debtor (Bell, *Com.* ii. 442, and cases there; *Ritchie*, 25 Jan. 1814; F. C.; affd. 5 Dow, 87). On the contrary, the practice became general to exact caution from the debtor as a condition of his liberation on a sick bill, whether his residence was determined or not. But it was doubted whether the magistrates were entitled to *insist* on caution being found, since this might in many cases operate so as to nullify the Statute. The rule was finally enunciated by the Court under L. P. Campbell: "that the law stands clear, magistrates being bound to pay regard to the health of prisoners, and to take such precautions as the circumstances might enable them to take consistently with the rights of the debtor" (Bell, *Com.* ii. 443, note). The right to insist on caution was thus negatived.

By the Prisons (Scotland) Act, 1839 (2 & 3 Vict. c. 42), s. 18, magistrates of burghs were relieved of all obligations in respect of prisons and the custody of prisoners; and sec. 72 of the Prisons (Scotland) Act, 1860 (re-enacting sec. 11 of 7 & 8 Vict. c. 34, and declared not to be repealed by the Prisons (Scotland) Act, 1877 (40 & 41 Vict. c. 53)), provides "when in reference to any person confined in a prison it is certified by two medical practitioners who have visited and carefully examined him . . . .

that he is afflicted with any disease which threatens immediate danger to life, and cannot be treated in prison, or that from his condition continued confinement would cause his death, it shall be lawful for the Sheriff, on summary application at the instance of the administrators of the prison, accompanied by such certificate, to order the prisoner to be removed to an hospital or other fit place, under such precautions as to the Sheriff may seem necessary and proper." (See also the Prisons Act, 1844, s. 13, the Prisons Act, 1860, s. 76, and the Prisons Act, 1877, s. 70, as to the Sheriff's powers—as coming in place of the magistrates in royal burghs—with respect to applications for aliment and for liberation of civil prisoners.) It is to be kept in view, however, that, with the exception of the few cases saved by the Debtors (Scotland) Act, 1880, and the Civil Imprisonment (Scotland) Act, 1882, imprisonment for debt is now abolished.

[Bell, *Com.* ii. 440 *et seq.*; Stair, iv. 47. 22; Bell, *Prin.* s. 2319; Ersk. iv. 3. 14; Ross, *Bell's Dict.* 1861, *h.t.*] See IMPRISONMENT (CIVIL).

Bill of Health (Shipping)—A certificate given to the master of a vessel by the authorities of the port from which she sails.—The bill may be clean, suspected, or foul, according to the sanitary condition of the port. A shipowner is bound to provide the papers necessary for the voyage, and will, therefore, be liable to the freighter for neglect to procure a bill of health where the absence of this document causes delay and consequent loss (*Levy*, 1816, 4 Camp. 389, 1 Stark, 212; see *Bell*, Com. i. 553; Maude & Poll., 4th ed., i. 143, and App. Forms, No. 48, for the form of a clean bill, issued by the Customs Commissioners). The fees exigible by British consuls in foreign ports in respect of bills of health are regulated by Orders in Council of 1 May 1855, and 27 July 1863. A bill of health, being a properly authenticated certificate of the ship's sailing port, may be used incidentally as evidence of ownership (see Arnould, *Marine Insurance*, 6th ed., ii. 628).

Bills of Lading.—The bill of lading may be considered in three aspects: (1) as a contract of carriage, or perhaps more strictly as evidence of such a contract; (2) as a document of title; and (3) as a security-writ.

I. AS A CONTRACT OF CARRIAGE.

In its original form the bill of lading was merely, as between the parties to it, evidence of a contract of carriage—which contract had been embodied in a charter-party prior to the delivery of the goods or the signing of the bill of lading. A vessel having been chartered to convey a cargo from one port to another, on terms fully expressed in the charter-party, the merchant loaded his goods on board, and, at the conclusion of the loading, received from the master a bill of lading acknowledging receipt of the goods, and obliging him to deliver same at the port mentioned in the charter-party. Its ordinary form (still largely employed) was as follows:—"Shipped in good order and well conditioned by *A. B. & Company*, in and upon the good ship called the *C.*, whereof *F. G.* is master for the present voyage, and now in the port of *X.*, and bound for *Y.*, 500 tons iron, being marked and numbered on the margin, and are to be delivered in the like good order and well conditioned at the foresaid port of *Y.* (the act of God, the Queen's enemies, fire, and all and every other danger and accident

of the sea, rivers, and of whatever nature and kind soever, excepted), or to the orders or assignees, he or they paying freight for the said goods, and all other conditions as per charter-party, with primage and average accustomed. —In witness whereof, the master or purser of the said ship hath conformed to three bills of lading all of this tenor and date—one of which being accomplished, the others to stand void."

Where the charterer was at the same time shipper of the goods, this simple document did not in any way alter the conditions of carriage as expressed in the charter-party. In so far as it contained an acknowledgment under the master's hand of the quantity and quality of cargo put on board, it was *primâ facie* evidence that goods of the specified quantity and quality had actually been received, but the evidence was capable of being rebutted by proof to the contrary. The obligation to deliver was mere surplusage,—this being already expressed or implied in the charter-party. As between the charterer and shipowner, accordingly, a bill of lading only afforded *primâ facie* evidence that the former's obligation to load cargo had been fulfilled.

The form of the document, however, shows that it was not intended to serve so limited a purpose. The obligation to deliver being general, shippers soon commenced to transfer the property in the goods by endorsing the bill of lading in favour of an assignee to whom they had sold the cargo therein described. The introduction in this manner of a third party entirely ignorant of the nature, quantity, and condition of the cargo which he was buying, except in so far as the bill of lading conveyed the information, very soon tended to modify its original character. Where the bill of lading contained no reference to the charter-party at all, its provisions, as in a question with the onerous endorsee, became the ruling ones, overriding the original contract; and the extensive use which was made of this class of document for transferring floating cargoes of merchandise soon elevated the bill of lading into a legal instrument of the first importance.

Effect in a Question with Onerous Endorsee.—Questions early arose between the endorsee and the shipowner, in consequence of the cargo, when delivered, not corresponding in quantity or description with the cargo specified in the bill of lading. The onerous endorsee, who had bought on the faith of the bill of lading, sought to make the shipowner responsible, on the ground that he had been induced to part with his money on a false statement subscribed by his servant the shipmaster. This matter has been the subject of frequent litigation; but it may now be held as settled, that if a captain signs for goods which were not actually shipped, the shipowner is not responsible for failure to deliver same. The ground of the decision was that the master was only authorised to sign for goods which he received (*M'Lean & Hope*, 9 M. (H. L.) 38). The bill of lading, however, affords *primâ facie* evidence that the goods therein described were actually shipped, and the shipowner must prove the contrary by the clearest evidence if he is to escape liability (*The Bedouin Steam Navigation Co.*, 1895, 3 S. L. T., No. 288). On the other hand, if the shipowner fails to show that the missing goods were not shipped, he is liable in damages for non-delivery, unless he can attribute the loss to any of the perils excepted.

If the goods are proved not to have been shipped, the consignee is not without recourse. He may either sue the shipper, or he may take action against the shipmaster in terms of the Bill of Lading Act of 1855, which provides that every bill of lading, in the hands of an assignee for value, is to be conclusive evidence against the master or other person signing the same, unless the holder of the bill of lading had actual notice, at the time

of receiving it, that the goods were not in fact loaded on board. There is a further proviso that the master may exonerate himself by showing that the misrepresentation was caused without default on his part, and wholly by the default of the shipper or holder, or some person under whom the holder claims. This provision has not been taken much advantage of in practice, partly perhaps because of the proviso, but mainly because of the difficulty of enforcing liability for any large sum against persons in the position of a shipmaster.

The laws of several foreign countries, notably Germany and the Scandinavian countries, are in contrast to the rule which has been established in this country. According to the law of these States, a clean bill of lading is conclusive evidence against the shipowner, and failure to deliver, whatever be the cause, renders the latter liable in damages unless the failure is attributable to any of the excepted causes contained in the contract itself. In many charter-parties a clause is now inserted, to the effect that the bill of lading signed by the master for the cargo loaded in terms thereof, shall form conclusive evidence against the shipowner of the amount of cargo shipped, and effect will be given to this clause in the courts of law (*Lishman*, 19 Q. B. D. 333).

Effect of Statements as to Condition of Goods.—The law on this subject is similar to that relating to the statement of quantity. The bill of lading affords *primâ facie* evidence that the goods were shipped in the condition there described, but this may be rebutted by contrary evidence (*The Peter der Grosse*, L. R. 1 P. D. 414). A strong illustration of the same principle is afforded by the case of *Craig & Rose*, 6 R. 1209, where oil was shipped in leaky casks for which a clean bill of lading was granted, with the result that a great part of the cargo had been lost before the vessel arrived. The shipowner was held not responsible for this leakage, he having proved that the casks were in bad condition when shipped. The statement as to condition must be understood, however, only of the external condition of the goods, the *onus* of proof being shifted where the goods are delivered sound externally, but inherently damaged. The consignee must then prove affirmatively that such damage was due to the fault of the shipowner or his servants, and not to inherent vice. In the case of misrepresentation as to condition, the consignee has no statutory remedy against the shipmaster.

The shipmaster frequently endeavours to qualify his obligation by adding to the bill of lading before signature a clause in the following or similar terms: "Weight, value, and contents unknown," or, "Quality and quantity unknown." The effect of this clause is that the master is not liable for the description of the weight, quality, or contents of the goods contained in the bill of lading; but he is bound to carry and deliver safely the goods he has received, whatever their contents or weight may be (*Lebeau*, L. R. 8 C. P. 88).

It would be beyond the scope of an article such as this to deal with the numerous cases which have arisen as to the effect of the various exceptions enumerated in different bills of lading. In each case the meaning of the exception depends on the construction put upon the contract by the Court. Some general rules, however, may be deduced from the numerous decisions on this branch of maritime law: (1) As the exceptions are introduced for the purpose of limiting the liability of the carrier at common law, they will, *in dubio*, be construed against the shipowner (*Burton*, 12 Q. B. D. 222). On the other hand, the construction will not be unnecessarily strict, but such as to give effect to the true intention of the parties. (2) Where, as frequently happens, the bill of lading consists of a printed form on which manuscript

additions or alterations have been made which are inconsistent with the printed matter, the writing will usually prevail, as being more likely to be expressive of the intention of the parties (*Scrutton*, 36 L. T. 212). (3) Unless expressly otherwise provided, the exceptions will not be held as excusing the shipowner from the initial obligation of providing a seaworthy ship. The decisions on this subject, which are numerous, are exemplified in the case of *Gilroy* v. *Price*, 20 R. (H. L.) 1. Even a latent defect, the existence of which renders the vessel unseaworthy after the voyage is commenced, is sufficient to infer responsibility (*The Glenfruin*, 10 P. D. 103). It is, however, now usual to guard against this contingency by an express clause exempting the shipowner from responsibility for latent defects. Even a stipulation that the shipowner is not to be responsible although the ship is unseaworthy when she sailed, is lawful and will receive effect (*Steel*, 4 R. (H. L.) 103); there being no Statute law, as in the case of railways, to the effect that the conditions must be reasonable. (4) If, on the vessel's arrival, the cargo is found to be damaged by one of the excepted causes, the ship is *primâ facie* freed from liability; but (where it has not been stipulated that the exemption shall apply even where the damage is attributable to the fault of the crew or other servants of the shipowner) the cargo owner must, in such a case, prove that the damage arose through fault on the part of the persons for whom the shipowner is responsible. Thus, where jute was carried under a bill of lading which, *inter alia*, declared that "the ship is not liable for sweat," and part of the cargo arrived in a damaged condition from "sweat," the burden of proving that the sweating had been occasioned by bad stowage or insufficient dunnage, etc., is thrown upon the cargo owner (*Horsely*, 20 R. 333).

Effect of Incorporating the Charter-Party by Reference.—The typical bill of lading before quoted contains a clause in these terms: "He or they paying freight for the said goods, and all other conditions as per charter-party." The effect of this clause is to incorporate all the provisions of the charter-party with regard to carriage, so far as these are not inconsistent with anything contained in the bill of lading itself. The clause is still of very usual occurrence, and is of great advantage to the shipowner, as it enables him to settle all disputes which may arise in connection with the voyage at the time of its termination,—the effect of the clause being that the onerous endorsee of the bill of lading becomes liable, in addition to his own contract obligations, for the obligations of the shipper under the charter-party, so far as these were still unperformed. Thus, if the charter-party provides that the shipowner is to have an absolute lien on the cargo for all freight, dead freight, and demurrage, as is almost invariably the case, the effect of the clause incorporating the charter-party is to make the consignee indirectly responsible for claims of demurrage arising at the port of loading, or of dead freight, even although he had no notice of the existence of such claims (*Gray*, L. R. 6 Q. B. 522; *Lamb*, 1882, 9 R. 482). This question was at one time much canvassed, but it may now be regarded as settled. The clause, however, does not incorporate conditions in the charter which are plainly unavailable to the consignee, nor such as would alter express stipulations in the bill of lading, *e.g.* the cesser clause is not so incorporated (*Gullischen*, 13 Q. B. D. 317), nor a clause of arbitration occurring in the charter-party. Similarly, if the bill of lading contains a clause of exceptions, that will not be extended by reference to the corresponding clause in the charter-party (*Delaurier*, 1889, 17 R. 167). The principle in such a case is that the consignee is not bound to examine the charter-party with reference to matters which are expressly dealt with in the bill of lading.

In exceptional cases, the responsibility which the consignee undertook in

accepting a bill containing a clause incorporating the conditions of the charter-party was so onerous, that shippers frequently attempted to induce the shipmaster to accept a bill of lading in which the charter-party was only referred to as a means of ascertaining the freight. In such a case the stipulated lien for demurrage at the port of loading, or for dead freight, could not be enforced against the consignee; and as the charter-party usually contained a cesser clause, the charterer who induced the shipmaster to sign a bill of lading in such terms also escaped liability. To protect against this injustice, charterers who desired to have a readily negotiable bill of lading have been obliged to limit the effect of the cesser clause, so as not to discharge their liability in respect of demurrage or other claims which had already accrued. Where the bill of lading makes no reference to the charter-party except for the purpose of ascertaining the freight, the goods are not liable for demurrage or dead freight, even though the endorsee had notice of claims made by the ship at the time when he acquired right to the bill of lading.

The effect of omitting the clause incorporating the conditions of the charter-party was that the bill of lading, as between the shipowner and the endorsee, contained the whole contract of carriage. The mere granting of the bill of lading, however, does not supersede the charter to the effect of preventing the charterer, while he remains the owner of the cargo shipped, from founding on the charter-party as in a question with the shipowner (*Rodoconachi*, 18 Q. B. D. 67). As between the original parties, the charter-party is regarded as the contract, and the bill of lading as a mere receipt for the goods. In like manner, where there is no cesser clause in the charter-party, the shipowner can still maintain an action against the charterer for unimplemented obligations incurred by him under the charter-party, even although he has delivered the cargo to endorsees of bills of lading under which they undertook no liability for these obligations.

In the cases which have been hitherto dealt with, the bill of lading has always followed upon a charter-party. In the case of general ships, however, it is now usual for the bill of lading granted for each parcel of goods to be the only document containing or evidencing the contract of carriage between the shipper and shipowner. Such bills of lading generally contain very elaborate clauses exempting the shipowner from liability. To be effectual against the shipper, however, it must be shown that he knew the terms upon which the shipowner contracted,—as expressed in the ordinary form of the bill of lading employed by him, and expressly or impliedly assented to these terms when he put the goods on board. A shipowner who puts up his ship as a general ship, or who runs a line of ships from ports to ports, habitually carrying all goods brought to him, is a common carrier (*Nugent*, 1 C. P. D. 19). Apparently, however, the only liability which he incurs as such, and in addition to the ordinary liability of the shipowner, is that of damages for improperly refusing to take goods tendered to him for carriage.

II. Bill of Lading as a Document of Title.

The use of the bill of lading as a document of title dates almost from the earliest period in its history. So far back as 1794 it was decided in the case of *Lickbarrow* v. *Mason*, 5 T. R. 683, that by the custom of merchants, which custom had been uniform for one hundred years preceding the judgment, the legal property in goods specified in a bill of lading was effectually passed upon endorsement or assignment. This doctrine, however, must be taken with the qualification that it was the intention of the parties that the property should pass when the endorsement or assignment was executed (*Sewell*, L. R. 10 App. Ca. 74). The bill of lading is no doubt the

symbol of the goods, but its transfer has no greater effect than the handing over of the goods themselves, which may either be by way of pledge, mortgage, or simple custody on behalf of the transferor.

One of the most important consequences of this doctrine is, that it prevents the unpaid endorser from stopping the goods *in transitu* when the vendor becomes insolvent, as in a question with the *bonâ fide* endorsee or transferee who has acquired right to the bill of lading from the vendee. The endorsement of the bill of lading operates immediate symbolical delivery of the goods contained in it to the endorsee, and thus, as in a question with him, as well as with the vendee, puts an end to the transit. The vendor, however, usually guards against this risk by not parting with the bill of lading until he has received the stipulated cash or acceptances of the consignee. Banks are now generally used as agents for foreign shippers in the delivery of bills of lading in exchange for the stipulated price, or part of the price which the consignee has undertaken to pay. Where the vendor retains the document of title, his right to stop *in transitu* remains. See STOPPAGE *in transitu*.

Owing to a curious technicality of English law, although the property in the goods specified in the bill of lading passed to the onerous endorsee, the contract with the carrier, of which it was the evidence, was not transferred. The result was that the endorsee could not maintain an action against the shipowner for not delivering the goods, or for damages for short delivery or the like. The Act of 1855, however, simplified the relations of parties by enacting as follows:—"Sec. 1. Every consignee of goods named in the bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such assignment or endorsement, shall have transferred to or vested in him all rights of suit, and shall be subject to the same liability in respect of such goods as if the contract contained in the bill of lading had been made with himself."

Can Endorsee have a Higher Right than Shipper?—This is a question not free from doubt, looking to the opinions expressed in the case of *Craig & Rose*. In one case, however, in England, the question was answered in the affirmative (*The Helene*, B. & L. 424). In that case the charterer of the vessel shipped goods on board of it, and received a bill of lading from the master. He saw and acquiesced in the way in which the goods were stowed. The method of stowage was, however, improper, and the goods were in consequence damaged on the voyage. The endorsee was held entitled to maintain an action of damages against the shipowner in respect of the improper stowage, although it was plain that the original shipper would have been barred by acquiescence (*Ohrloff*, L. R. 1 P. C. 231). The view taken seems to be, that what is transferred is not the right of the shipper as an individual or as charterer, but his position under the contract evidenced by the bill of lading.

III. Bill of Lading as a Security-Writ.

The preceding observations apply to the case where the entire property in the goods passes from the shipper to the consignee by endorsement and delivery of the bill of lading; but as moveables of any kind can be deposited under a contract of pledge, so it is competent to use the bill of lading as a security-writ to cover advances made by the holder. When the bill of lading is so used, the property passes to the endorsee to the effect only of enabling him to operate payment of his claim out of the security-subjects, leaving him liable to account for the balance to the prior holder.

If the advances are repaid by the borrower before the bill of lading is presented, the endorsee is bound to re-endorse it to him, and the latter's rights against the shipowner are in no way affected by the fact that, during a portion, or perhaps the whole, of the voyage, the legal property has been in another.

An endorsement which operates simply as a pledge of the goods, leaves in the unpaid vendor the right of stoppage *in transitu* of the property remaining in the borrower who, *ex hypothesi*, has never absolutely parted with the property in the goods. But this right cannot be exercised so as to affect prejudicially the interests of the endorsee, who is entitled to realise the goods, and to pay himself out of the proceeds, before the vendor can claim any part of the price. This is, of course, subject to the ordinary rules of bankruptcy, which apply to securities constituted by transfer or endorsement of bills of lading, in the same way as the endorsement of bills of exchange. Thus, if granted for a prior debt within sixty days of bankruptcy, such endorsements are reducible under the 1696 Act, c. 5. But the fact that the endorsee knows the goods have not been paid for, will not prevent him from claiming the benefit of his security in a question with the unpaid vendors or other creditors of the vendee.

Liability of Endorsee for Freight.—The endorsee who presents the bill of lading and receives from the shipmaster delivery of the goods, becomes thereby liable for the freight, even if it should exceed the value of the goods themselves. But an endorsee who has himself endorsed over the bill of lading to a third party, is not liable for the freight from the mere fact that for a time he held a right of property in the goods symbolised by the bill of lading (*Smurthwaite*, 11 C. B. (N. S.) 847). So a pledgee of the bill of lading is not liable for the freight unless he receives the cargo,—the argument founded upon the words of sec. 1 of the Bills of Lading Act, 1855, that the property in the goods had passed to him by reason of the endorsement being rejected (*Sewell, supra*). Nor is the holder of a bill of lading which represents the freight to have been paid, liable for freight, although no actual payment has been received by the shipowner (*Howard*, 1 B. & Ad. 712). Even a person who received the cargo is not answerable for the freight, if it is known to the master that he was acting only as agent of the consignor (*Amos*, 8 M. & W. 798); the master's remedy in such a case is the lien which the common law gives him to retain the goods until the freight is paid. Where, however, the agent holds himself out as receiver under the bill of lading, he will be personally liable for the freight. In no case is the owner of cargo, who receives it by agents, relieved from liability unless the shipowner has expressly assented to take some other debtor in his place, and he cannot escape such liability by abandoning the cargo (*Dakin*, 33 L. J. C. P. 115). See FREIGHT.

A transfer of a bill of lading for a past debt is sufficient to support the right of the transferee who acquired the property in good faith (*Leask*, 2 Q. B. D. 376); and the delivery of the endorsed bill of lading is *primâ facie* evidence of the transfer of the entire property. But the true cause of the endorsement—as by way of pledge, mortgage, etc.—may be proved by anyone having an interest to do so.

Some further matters, which do not properly fall under the three heads above noticed, require to be briefly dealt with.

Bills of Lading drawn in Sets.—Bills of lading are usually drawn in sets of three, under the proviso expressed in the typical bill of lading to the effect that if one is accomplished, the others are to stand void. This was done for the convenience of shippers or merchants, and to guard against the risk of loss of the document of title if only one was signed by the

master. The practice has, however, occasionally been turned to account by fraudulent shippers so as to obtain advances from different persons on the security of the same goods. The master of the ship is, however, in safety if he delivers to the endorsee who first presents his bill of lading, without notice that there is a competing claim (*Glyn*, 7 App. Ca. 591). But if he is made aware, before parting with the goods, that there are competing claimants, he must deliver at his peril to the rightful holder, or follow the safer course of declining to choose between them, and simply discharge the goods into a public warehouse, subject to his own lien for freight, demurrage, etc. As between the endorsees, the one who first obtains the endorsement for value is entitled to delivery of the goods.

Law Applicable to Bills of Lading.—The rule as to this cannot be easily gathered from the decisions. The guarded statement of Mr. Scrutton to the effect that "the construction of bills of lading must be governed by the law by which it appears from all the circumstances that the parties intended to be bound," although probably accurate, being of no practical assistance (Scrutton on *Charter Parties*, art. 7). The question in its general aspects was considered by Mr. Justice Willis, who delivered the judgment in the case of *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115. His Lordship said that the law which was to govern a contract of affreightment, between persons of different nationalities, was to be sought in the first instance in the language of the contract; and that if it was not to be found there, the parties probably intended that as between them the law of the ship should govern. This rule seems to have been consistently applied in every case where the goods were delivered in Britain on board a British ship, even although the place of delivery was some foreign port (*Moore*, 1 App. Ca. 318); and also where the goods were delivered by British subjects on board a British ship (*Missouri Steam Ship Company*, 42 Ch. D. 321). The same decision was arrived at where a German ship with a German master was chartered by German charterers from Russia to England, it being held that the German law must govern the interpretation of the documents, even although they were expressed in English (*The Express*, L. R. 3 Ad. 597). But in precisely similar circumstances, where an English merchant shipped goods in England to be carried to a Dutch port, in a ship flying the Dutch flag, it was held that the contract must be governed by English law, mainly on the ground that the vessel was in fact owned by an English joint-stock company. Various earlier authorities, which proceeded upon a different view, may be held to be overruled by these later decisions. The Scotch case of *Halmoe*, 15 R. 152, in which the question was mooted, appears to be inconsistent with the opinions in the more authoritative of the English decisions.

Master's Refusal to Sign Bills of Lading.—Disputes not infrequently arise between shippers and the master as to the terms of the bills of lading which are presented for the master's signature. As a general rule, it may be stated that the master is not bound to sign a bill of lading which, taken in conjunction with the cesser clause of the charter-party, will have the effect of discharging liabilities which the charterer has already incurred to the ship. The common condition in the charter-party, "that captains shall sign bills of lading as presented at any rate of freight without prejudice to the charter-party," imports that the charterer may insert a different rate of freight from that stipulated in the charter-party, but not any other departure from its terms (*Arrospe*, 8 R. 602). On the other hand, the master is not entitled to insert stipulations in the bill of lading in favour of the ship which are not warranted by the charter-party. His

refusal to sign a bill of lading, except on such a footing, is a breach of the charter-party (*Jones*, L. R. 5 Ex. Div. 115). And if he wrongfully sails away with the cargo without granting a bill of lading, he is liable as for a conversion. On the other hand, if he sails with the intention of delivering the cargo to the consignee named in the bills of lading, and without objection on the part of the consignor, he may not be guilty of conversion. He would be so if the cargo owner had refused to allow the cargo to go on the voyage without a bill of lading, and had demanded that it should be discharged and returned to him.

Master's Authority to vary Contract of Carriage.—The master has no authority to vary the contract which the owner has already made, by signing bills of lading different from the charter-party. But if he does so, and the bill of lading is transferred to a *bonâ fide* holder for value, the shipowner will, in the general case, be bound, as in a question with the latter, by the terms of the bill of lading. He will, however, not be bound if the variations are clearly beyond the ordinary powers of a master—as if the master contracts to carry goods freight-free (*Grant*, 10 C. B. 665); or if he makes the freight under the bill of lading payable to a third party other than the owner (*Reynolds*, 7 B. & S. 86). Even if the master succeeds in getting the shipper to accept a bill of lading which is more favourable to the ship than the charter-party, the alteration will not avail the shipowner (*Rodoconachi*, L. R. 17 Q. B. D. 316).

For other points not dealt with in this article, see CHARTER-PARTY; DEMURRAGE; FREIGHT; MATES' RECEIPTS; SHIPMASTER; and STOPPAGE *in transitu*.

Bill of Sale in English law means primarily a deed assigning personal property by way of sale, in which sense it has received statutory recognition (extending also to Scotland) in the case of the transfer of a ship (see BILL OF SALE OF SHIP). But the expression is usually employed in England to designate a deed or instrument operating a conveyance in security of debt, in which derivative sense it is the subject of a series of statutes called Bills of Sale Acts. The object of these Acts was to remedy an evil arising from the common law rule of England and Ireland, that "a man might take a security upon goods without carrying away the goods or taking possession of them" (per L. Blackburn in *Cookson* (H. L.) 1884, 9 App. Ca. 653 at 664). The first Bills of Sale Act was that of 1854 (17 & 18 Vict. c. 36), the effect of which was to render it necessary to register a bill of sale of personal chattels in a prescribed manner within a limited period, in order to make it valid against general or execution creditors of the grantor who remained in possession or apparent possession of the chattels. This Act was amended in 1866 (29 & 30 Vict. c. 96), but both Acts were repealed by the Bills of Sale Act of 1878 (41 & 42 Vict. c. 31). The Act of 1878, and the Amendment Act of 1882 (45 & 46 Vict. c. 43) now form the leading Bills of Sale Acts,—the others being short Amendment Acts in 1890 and 1891 (53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35). Scotland and Ireland were excluded from the operations of all these Acts, but similar legislation was applied to Ireland in 1879 and 1883 (42 & 43 Vict. c. 50; 46 Vict. c. 7). The existing Acts render an unregistered bill of sale invalid, not only in questions with the general creditors or with an execution creditor of the grantor, but also as between successive assignees of the same chattels, such assignees having priority in the order of the date of the registration of their respective bills of sale, much in the same way as successive disponees of heritable subjects in Scotland rank according to the registration of their

deeds in the Register of Sasines. The Act of 1878 includes within its scope any bill of sale by which the creditors of the grantor are prejudiced, although it may not have been given by way of security for advances. A bill of sale not in security, but absolute and duly registered under the Act of 1878, excludes as to the chattels comprised in it the reputed ownership established by Statute in 1623 (21 Jas. I. c. 19), and now embodied in sec. 44 of the English Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). The Bills of Sale Act of 1882 applies only to bills of sale given by way of security for the payment of money, and registration under it does not prevent the chattels from being also subject to the statutory reputed ownership before referred to. The Act of 1882 prescribes a form of bill of sale which must be strictly adhered to in all cases coming under the Act. It also makes void every bill of sale made or given in consideration of any sum under £30, and enacts other stringent conditions, non-compliance with which will render the bill of sale absolutely void as against all persons.

The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71) having extended to Scotland the English principle of passing the property irrespective of delivery, it has been suggested that the Bills of Sale Acts should also be applied to Scotland, as being the necessary complement of that principle. But it must be kept in view that the passing of the property by the contract is due to the *common law* of England, and that the rule applies to securities as well as to sales, while in Scotland, apart from Statute, delivery is necessary in order to transfer any real right to the assignee. In the sale of goods the law of Scotland is now assimilated in this respect to that of England, but the Sale of Goods Act expressly excludes from its operation "any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security" (sec. 61 (4)). It appears, therefore, that all the purposes of the English Bills of Sale Acts are fulfilled in Scotland (1) by the old Scottish Bankruptcy Acts of 1621, c. 18, and 1696, c. 5; and (2) by the necessity for delivery, in order to the validity of a transfer of corporeal moveables in security of debt. The old Scottish Acts protect creditors against gratuitous alienations and fraudulent preferences by an insolvent, while the necessity for delivery meets the case of creditors being misled by the apparent ownership of the debtor. In a true sale the case is different, for, under the Sale of Goods Act, the purchaser may now in Scotland, as well as in England, claim from the general creditors of the seller goods sold but left in the seller's possession. The provisions of sec. 25 of the Sale of Goods Act protect a buyer who has *bonâ fide* purchased and obtained delivery of goods previously sold to another, but the right thus secured is that of an individual, while the general creditors of the seller are not protected from the false credit arising from reputed ownership. It is possible, therefore, to support the extension to Scotland of the English statutory reputed ownership, while at the same time maintaining that the application to Scotland of the Bills of Sale Acts is unnecessary, and might be mischievous.

Bill of Sale of Ship.—A bill of sale is the appropriate instrument of title for passing the property in a ship, and as such is recognised by the laws of all maritime countries (L. Stowell in *The Sisters*, 5 C. Rob. A. 159; Maclachlan on *Shipping*, 32). The law is codified in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, ss. 24, 26). A registered ship, or a share therein, when disposed of to a person qualified to own a British ship, must be transferred by a bill of sale containing a description

of the ship sufficient to identify her, and executed by the transferor in presence of at least one attesting witness (s. 24). The transferee may then be registered as owner, on his first making a declaration that he is himself qualified to own British ships, and that no unqualified person has, to the best of his knowledge, any interest in the ship transferred (ss. 25 and 26). Bills of sale of a ship are entered in the register in the order of their production to the registrar.

The form to which a bill of sale of a ship must, as nearly as circumstances permit, conform is set out in Schedule I. A. of the Act:—

Official No.	Name of Ship.	No., Date, and Port of Registry.

No., Date, and Port of previous Registry (if any).

Whether British or Foreign built.	Whether a Sailing or Steam Ship; and if a Steam Ship, how propelled.	Where built.	When built.	Name and Address of Builders.

			Feet.	Tenths.
No. of Decks	Head . . .	Length from fore part of Stem, under the Bowsprit, to the aft side of the Head of the Stern-post		
No. of Masts	Framework and Description of Vessel . .	Length at quarter of depth from top of Weather Deck at side amidships to bottom of Keel		
Rigged . .	No. of Bulkheads	Main breadth to outside of Plank . . .		
Stern . .	No. of Water Ballast Tanks and their capacity in tons . .	Depth in Hold from Tonnage Deck to Ceiling at midships		
Build . .		Depth in Hold from Upper Deck to Ceiling at midships in the case of three Decks and upwards		
Galleries .		Depth from top of Beam amidships to top of Keel		
		Depth from top of Deck at side amidships to bottom of Keel		
		Round of Beam		
		Length of Engine room, if any . . .		

PARTICULARS OF DISPLACEMENT.

Total to quarter the depth from weather deck at side amidships to bottom of keel . tons.	Ditto per inch immersion at same depth . . . . . tons.

PARTICULARS OF ENGINES (if any).

No. of Engines.	Description.	Whether British or Foreign made.	When made.	Name and Address of Makers.	No. of and Diameter of Cylinders.	Length of Stroke.	N. H. P., I. H. P., Speed of Ship.
	Engines.		Engines.	Engines.			
	Boilers. Number . . . Iron or Steel . . Pressure when loaded		Boilers.	Boilers.			

PARTICULARS OF TONNAGE.

Gross Tonnage.	No. of Tons.	Deductions Allowed.	No. of Tons.
Under Tonnage Deck . . .		On Account of Space required for Propelling Power	
Closed-in Spaces above the Tonnage Deck, if any:		On Account of Spaces occupied by Seamen or Apprentices, and appropriated to their use, and certified under the regulations scheduled to this Act. These Spaces are the following, viz.:	
Space or Spaces between Deck .			
Poop			
Forecastle			
Round house			
Other closed-in Spaces, Spaces for Machinery, Light, and Air, if any		On Account of Space used exclusively for accommodation of master, for the working of the helm, the capstan, and the anchor gear, or for keeping the charts, signals, and other instruments of navigation, and boatswain's stores, and for space occupied by donkey engine and boiler, and in case of sailing ships for space used for storage of sails	
		Cubic Metres.	
Gross Tonnage . .			
Deductions as per Contra .			
Registered Tonnage .		Total Deductions .	

* "I" or "we."
† "Me" or "us."
‡ "I" or "we."
§ "Myself and my" or "ourselves and our."
‖ "His," "her," or "their."
¶ "I" or "we."
** If there be any subsisting Mortgage, or outstanding Certificate of Mortgage, add "save as appears by the Registry of the said ship."

Note.—A purchaser of a Registered British Vessel does not obtain a complete title until the Bill of Sale has been recorded at the Port of Registry of the Ship; and neglect of this precaution may entail serious consequences.

* in consideration of the sum of paid to† by , the receipt whereof is hereby acknowledged, transfer shares in the ship above particularly described, and in her boats, guns, ammunition, small arms, and appurtenances, to the said .

Further‡ , the said for§ heirs covenant with the said and‖ assigns, that¶ have power to transfer in manner aforesaid the premises herein-before expressed to be transferred, and that the same are free from incumbrances** .

In witness hereof ha hereunto subscribed name and affixed seal this day of One thousand eight hundred and .
Executed by the above-named }
in the presence of }

Bill of Suspension.—See Suspension.

Bill (Parliamentary).—See Parliament; Statute Law; Private Bill Legislation; Locus standi.

Bills, Single.—See Single Bills.

Billeting.—In early times troops were billeted under an order from the king or some person authorised by him. The abuse of the practice led to its being declared illegal by the Claim of Rights, 11 April 1689, and in England by the Petition of Right (3 Car. I. c. 1). The practice continued, however, until it was again declared illegal by Act of Parliament in 1679 (31 Car. II. c. 1). The establishment of a standing

army after the Revolution made some such provision necessary, owing to the want of barrack accommodation, and accordingly billeting was authorised by the Mutiny Act, 1689 (1 Will. & Mary, sess. ii. c. 4). The power conferred by that Act was continued by subsequent Mutiny Acts, and is now regulated by Part III. of the Army Act, 1881 (44 & 45 Vict. c. 58).

Billeting in private houses has never been legal in England. In Scotland private houses were not exempted before the Union (Act of Convention, 1667; Act, 1681, c. 3); nor was any change made when the Mutiny Act was extended to Scotland after the Union, for it was provided by 7 Anne, c. 4, s. 22, that officers and soldiers may be quartered in such and like places and houses as they might have been quartered in by the laws in force at the time of the Union. It was not till 1857 that the provisions as to billeting in Scotland were assimilated to those in force in England (20 Vict. c. 13). The increase in barrack accommodation has now rendered billeting practically unnecessary, except when troops are actually on the march.

The following are the principal regulations with regard to billeting, contained in the Army Act, 1881. The police authority of any place shall annually make out a list of victualling-houses liable to billets, specifying the situation and character of each victualling-house, and the number of soldiers and horses who may be billeted on the keeper thereof (s. 107 (1)). The list shall be open to inspection at some convenient place, and any person who feels aggrieved either by being entered on such list, or being entered to receive an undue proportion of officers, soldiers, or horses, may complain to any court of summary jurisdiction; and the Court, after such notice to interested parties as it thinks necessary, may order the list to be amended as the Court thinks just (s. 107 (2)). The list so made out merely determines the proportion in which the billets are to be distributed among the keepers of victualling-houses, and is not conclusive as to the number of officers, soldiers, or horses for whom the keeper of the victualling-house shown in the list may be required to find accommodation on an emergency (*Sharratt*, 1892, L. R. 2 Q. B. 479). Every constable for the time being in charge of any place in the United Kingdom, mentioned in the route issued to the commanding-officer of any portion of Her Majesty's regular forces, shall, on the demand of such commanding-officer, or of an officer or soldier authorised by him, and on production of such route, billet on the occupiers of victualling-houses, and other premises specified in the Act as victualling-houses, in that place, such number of officers, soldiers, and horses, entitled under the Act to be billeted, as are mentioned in the route and stated to require quarters (s. 103 (1)). The route is issued under the authority of Her Majesty, and is signed by such officer as the commander-in-chief may from time to time order in that behalf (s. 103 (2)). A constable shall observe the directions given to him for the due execution of the Act by the police authority; and the police authority, or any member thereof, and every justice of the peace, may, if it seem necessary, and, in the absence of a constable, shall themselves or himself exercise the powers and perform the duties vested in or imposed on a constable (s. 120 (1)). No person holding a military office or commission shall be concerned directly or indirectly, either as a justice or as a constable, in billeting or appointing quarters for any officer, soldier, or horse of the corps under his immediate command (s. 120 (2)). If the keeper of a victualling-house feels aggrieved by having an undue proportion of officers, soldiers, or horses billeted on him, he may apply to a justice of the peace, or, if the billets have been made out by a justice, may complain to a court of summary jurisdiction, and the justice

or court may order such of the officers, soldiers, or horses as may seem just to be removed and billeted elsewhere (s. 108 (3)). A constable having authority in a place mentioned in the route may act for the purposes of billeting in any locality within one mile from such place (s. 108 (4)). A justice of the peace may, at the request of an officer or a non-commissioned officer, authorised to demand billets, vary the route by adding any place or omitting any place, and may also direct billets to be given above one mile from a place mentioned in the route (s. 108 (7)). Victualling-houses include all inns, hotels, livery stables, or alehouses, also the houses of sellers of wine by retail, whether British or foreign, to be drunk in their own houses, or places thereunto belonging, and to all houses of persons selling brandy, spirits, strong waters, cider, or metheglin by retail (s. 104 (1)). The following are exempted from liability for billeting:—Private houses; canteens held or occupied under authority of the Secretary of State; houses of distillers, kept for distilling brandy and strong waters, so as such distiller does not admit tippling in his house; the house of any shopkeeper whose principal dealing is more in other goods and merchandise than in brandy and strong waters, so as such shopkeeper does not admit tippling in such house; and the house of residence of any foreign consul, duly accredited as such (s. 104 (2)). Officers, soldiers, and horses are entitled to be billeted (s. 105). Lodging and attendance for an officer; lodging, attendance, and food for a soldier; and stable room and forage for a horse, in accordance with schedule 2 of the Act, must be provided (s. 106 (1)). The requisite accommodation may be provided by the keeper of the victualling-house in the immediate neighbourhood, if his own house be full, or he has not proper accommodation (s. 106 (2)). The prices to be paid are such as are for the time being authorised in this behalf by Parliament (s. 106 (3)), and are fixed by the Army Annual Act, which brings the principal Act into force. The officer or soldier demanding billets must, before he departs, and if he remains longer than four days, at least once in four days, pay the just demands of the keeper of the victualling-house (s. 106 (4)); and if, by reason of a sudden order to march or otherwise, the officer or soldier is not able to make payment before he departs, he must before departure make up with the victualling-house keeper an account of the amount due, and forthwith sign and transmit it to a Secretary of State, who shall cause the amount as due to be paid (s. 106 (5)). If a constable billets any officer, or soldier, or horse, on any person not liable to billets, without the consent of such person, or receives, demands, or agrees, for any money or reward whatsoever, to excuse or relieve a person from being entered in a list as liable or from his liability to billets, or from any part of such liability; or billets or quarters on any person or premises, without the consent of such person, or the occupier of such premises, any person or horse not entitled to be billeted; or neglects or refuses, after sufficient notice is given, to give billets demanded for any officer, soldier, or horse entitled to be billeted,—he is liable on summary conviction to a fine of not less than 40s., and not exceeding £10 (s. 109). If a keeper of a victualling-house refuses or neglects to receive any officer, soldier, or horse billeted upon him, in pursuance of the Act, or to furnish such accommodation as is required by the Act; or gives or agrees to give any money or reward to a constable to excuse or relieve him from being entered in the list as liable or from his liability to billets, or any part of such liability, or gives or agrees to give to any officer or soldier billeted upon him, in pursuance of the Act, any money or reward in lieu of receiving an officer, soldier, or horse, or furnishing the said accommodation,—he is on summary

conviction, liable to a fine of not less than 40s., and not exceeding £5 (s. 110). If any officer quarters or causes to be billeted any officer, soldier, or horse, otherwise than he is allowed by the Act, upon any person, he shall be guilty of a misdemeanour (s. 111 (1)). This section also provides that if an officer or soldier commits certain offences which are already made military offences by sec. 30 of the Act, and which are similar to the offences which have been provided for with regard to constables and keepers of victualling-houses in secs. 109 and 110 (see *supra*), he shall be liable, on summary conviction, to a fine not exceeding £50. A certificate of a conviction for an offence under this section shall be transmitted by the Court making such conviction to a Secretary of State (s. 111 (3)). Sec. 119 provides that any keeper of a victualling-house who is aggrieved by the non-payment of a sum due to him, or suffers any ill-treatment by violence, extortion, or making disturbance in billets, from any officer or soldier, may, on failing to obtain redress from the commanding-officer, apply to a court of summary jurisdiction, who may certify to a Secretary of State the amount to be paid, and the Secretary of State may either cause the amount due to be paid, or, if he thinks the amount not justly due, direct a complaint to be made to a court of summary jurisdiction, in the place for which the Court giving the certificate acted, and the Court, after hearing the case, may confirm the said certificate, or vary it as may seem just. A court of summary jurisdiction means the Sheriff or Sheriff-Substitute, or any two justices of the peace, or any magistrate or magistrates to whom jurisdiction is given by the Summary Procedure (Scotland) Act, 1864.

[See *Manual of Military Law* (War Office, 1894); Tovey, *Military Law*; Pratt, *Military Law*.] See ARMY.

Birds, Protection of Wild.—All Acts dealing with the preservation of wild birds prior to 1880 were abolished by sec. 7 of the Act passed in that year. This Act (43 & 44 Vict. c. 35) (with an amending Act passed in 1881 (44 & 45 Vict. c. 51)) forms the principal Act for the preservation of the birds themselves, while in 1894 a further amending Act (57 & 58 Vict. c. 24) was passed extending the principle of preservation to the eggs of wild birds. A close-time is provided for all wild birds from 1st March to 1st August (s. 3, Act 1880); and anyone who destroys or takes, or who attempts to destroy or take, wild birds, between those dates, or who, after the 15th of March exposes for sale or is in possession of birds recently taken (s. 3), renders himself liable to be summarily prosecuted before the Sheriff (s. 5), and to a penalty of £1 for each bird and costs in the event of the bird taken or destroyed being one of the following, viz.: American quail, auk, avocet, bee-eater, bittern, bonxie, colin, cornish chough, coulterneb, cuckoo, curlew, diver, dotterel, dunbird, dunlin, eider duck, fern owl, fulmar, gannet, goat-sucker, godwit, goldfinch, grebe, greenshank, guillemot, gull (except black-backed gull), hoopoe, kingfisher, kittiwake, lapwing, loon, mallard, marrot, merganser, murre, night hawk, night jar, nightingale, oriole, owl, ox bird, oyster-catcher, peewit, petrel, phalarope, plover, ploverspage, pochard, puffin, purre, razorbill, redshank, reeve or ruff, roller, sanderling, sandpiper, scout, sealark, seamew, sea-parrot, sea-swallow, shearwater, shelldrake, shoveller, skua-snew, snipe, solan goose, spoonbill, stint, stone curlew, stonehatch, summer snipe, tarrock teal, tern, thick-knee, tystey, whaup, whimbrel, widgeon, wild duck, willock, woodcock, woodpecker (s. 3, and Schedule to the 1880 Act); and also larks (s. 2, Act 1881) and any other bird the Secretary of State may declare to be included in the Schedule of the Act

1880, with respect to any district, on the application of the County Council for that district (s. 3, Act 1894). The penalty for all other birds is a reprimand and costs for the first offence, and 5s. a bird and costs thereafter (s. 3, Act 1880). No one is liable for exposing a bird for sale after the 15th March who can satisfy the Court that the killing of the bird was lawful at the time when and by whom it was killed, or that it was killed in a place to which the Act does not extend (s. 1, Act 1881). The fact that the bird has been imported is *primâ facie* evidence of this. Any person may require an offender against the Act to give his name and address; and if he refuse, or give a false name or address, an additional penalty of 10s. may be imposed (s. 4, Act 1880). Any offence on the sea beyond the Sheriff's jurisdiction is held to be committed in any county abutting said sea-coast; and where it is committed on water which bounds two counties, the offender may be prosecuted in either county (s. 6, Act 1880). The Secretary of State for Scotland may, on the application of the County Council for any district who, supersede the justices in quarter sessions, in terms of the Local Government Act, 1889 (52 & 53 Vict. c. 50, s. 11), extend the close-time for that district (s. 8, Act 1880), or may prohibit the taking of eggs of any specified species, or of any species whatever (s. 2, Act 1894). Any order by the Secretary of State must be advertised in the local newspapers, and by the fixing of notices in public places (s. 4, Act 1894).

A Bill was introduced in the House of Lords in 1896 giving the Secretary of State for Scotland power to prohibit the killing of any particular species of bird at any time in any district, on application to him by the County Council for the district.

Birth.—See Registration of Births, etc.; Child Murder; Concealment of Pregnancy.

Birth-brief—Borebrieve—A genealogy issued with the authority and attestation of the King, Privy Council, Chancellor, or Parliament. It was commonly obtained by Scotsmen resident abroad whose object was to prove their nobility at Court or before foreign tribunals dealing with taxation.—[Riddell, *Answer to the Partition of the Lennox*, 73; Seton, 467–468, 482].

Bishops Teinds are teinds which were formerly possessed by bishops, and fell to the Crown on the abolition of Episcopacy. At one time it was thought an essential fact that the teinds had been in the hands of a bishop before 1587 (L. Moncreiff in *Kinneff Loc.*, 6 July 1830 (not reported)). But it has now been held that teinds in possession of a bishop during the Submission proceedings in 1627 and 1628, ratified by Statute in 1633, are bishops teinds (*Lord Advocate*, 11 July 1873, 11 M. 896). See Teinds.

Black Acts.—Certain printed collections of Acts of the Scottish Parliament are called the Black Acts, from the fact that they are printed in black letter type (Kames, *Statute Law*, p. v.; Ersk. i. 1. 37). These collections are—(1) the edition of 12 October 1566, consisting of Acts

of the Parliaments from 1424 to 1564; (2) the edition of 28 November 1566, which differs from the former in the exclusion of certain Acts printed in that edition, mainly relating to ecclesiastical affairs, and in the addition of a few Acts of a miscellaneous character; cc. v., viii., lxiii., lxiv., lxv., lxvi., lxvii., lxviii., lxix., lxx., lxxi. James v. and iii. Mary of the first edition are left out, and nine Acts, indexed at fol. clxxxii., are inserted; (3) collections of the Acts of the year 1567 and subsequent years, down to 1594, published from time to time, namely, 1567, 1573, 1575, 1579, 1582, 1585, 1594. These Acts are usually found bound in one volume with the earlier Acts just mentioned. In 1541 a selection of Acts, dating 1535–1540, was published. It is seldom, if ever, quoted. During the Cromwellian Protectorate, Instructions by the Protector's Council and Acts of the English Parliament relating to Scotland were printed in black letter.

Black List.—See SLANDER.

Black Maill.—The origin of the term black maill was the payment of rent in copper or base money—*firma nigra*, or black maill, as distinguished from *alba firma*, or silver maill; but the term became peculiarly associated in Scotland with annual contributions of money made by owners of land to secure themselves from cattle lifters or rievers. The receiving and paying of black maill was made a capital offence in Scotland by the Statute 1567, c. 21, and in England by 43 Eliz. c. 13. Hume expresses doubt as to whether the death penalty was ever inflicted under the Scottish Statute (Hume, i. 477). As late as 1741 a bond of black maill was entered into by which certain parties undertook, in consideration of an annual payment, to restore cattle stolen or pay their value. Hume, however, says, "Happily it will not be necessary to engage in a more particular inquiry concerning the nature of this enormity, which is now entirely unknown" (Hume, i. 476). The term black maill has lost its original signification and association. It has now no legal meaning, and is popularly used to describe money or anything valuable extorted from persons under the influence of threats. As popularly used now, the term black maill includes extortion verbally or by letter, by threats of personal violence, or by threats of making charges of crime or immorality.—[Hume, i. 476; Ersk. iv. tit. 4. 64; Bankton, i. 70.] See FORCE AND FEAR; EXTORTION; CONSPIRACY.

Black Rod, Gentleman Usher of the.—An officer of the Crown, appointed by royal letters patent, and subordinate to the Lord Chamberlain of England. During the sittings of the House of Lords he attends on it in his official capacity. It is his duty to summon the Commons when their attendance is required in the House of Lords; to execute orders of that House for commitment of parties guilty of contempt or of breach of privilege. He assists also at the introduction of peers and at other ceremonies. His title is derived from the fact that his badge of office is a black rod. His deputy is the Yeoman Usher.—[May, *Parliamentary Practice*, 194; Wharton, *Lex, h.t.*; Bell, *Dict., h.t.*]

Blanch Holding.—See BLENCH.

Blank Bill.—*Definition.*—The phrase "blank bill" would seem to be applicable (1) to a simple signature on a blank sheet of paper impressed with a bill stamp, and (2) to a bill which is wanting in some material particular, such as the date or the sum engaged for.

Provisions of Bills of Exchange Act, 1882.—The law on the subject is codified by sec. 20 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which provides that "where a simple signature on a blank stamped paper is delivered by the signer, in order that it may be converted into a bill, it operates as a *primâ facie* authority to fill it up for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an endorser." And when a bill is wanting in any material particular, the person in possession of it has a *primâ facie* authority to fill it up as he thinks fit. But in order that a bill may be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time (which is a question of fact), and in accordance with the authority expressly or impliedly given. This limitation, however, is not applicable if the party suing upon the bill is a holder in due course (s. 20, *supra*).

This Section Declaratory of the Common Law of Scotland.—These provisions appear to be a statement of the common law of Scotland on the subject. Thus a bill is an exception to the rule that a deed must be complete *in essentialibus* when delivered (Dickson on *Evidence*; Grierson, s. 653), and is not struck at by the Act 1696, c. 25, "anent blank bonds and trusts." (See BLANK BONDS.) And it was held that if a man signed his name upon a bill stamp, and delivered it to *A.* for his accommodation, it was an authority to *A.* to fill it up as he pleased (*Grassick*, 1846, 8 D. 1073; *M'Meckin*, 1881, 8 R. 587). But an obligation to pay a sum of money not addressed to anyone, nor to bearer, and with no blank for the name of a payee, is not a blank bill or note, and is void under the Act 1696, c. 25 (*Macdonald* (*Duncan's Tr.*), 1872, 10 M. 984).

Stamp.—The liability of the signer of a blank bill is limited by the stamp, unless it is made payable on demand. A bill of exchange payable otherwise than on demand must be written on an impressed stamp, calculated on an *ad valorem* scale of one shilling for every hundred pounds (Stamp Act, 1870, 33 & 34 Vict. c. 97, s. 23, and schedule). A bill payable on demand may be stamped, with a fixed duty of one penny, either by an impressed or an adhesive stamp, provided, in the latter case, that the stamp is cancelled by the party by whom the bill is signed before he deliver it out of his hands (Stamp Act, 1870, s. 50; *Hobbs*, 1890, 6 T. L. R. 292). If, therefore, a party writes his signature on a bill, impressed with a penny stamp, his liability, in a question with a holder in due course, would seem to be unlimited, as the signature would operate as a *primâ facie* authority to fill it up as a bill, or cheque, for any amount (Bills of Exchange Act, 1882, ss. 20, 73). It is doubtful whether the words "blank stamped paper," as used in sec. 20 (quoted, *supra*), apply to a signature written across an adhesive stamp. (Thorburn, *Bills of Exchange Act*, p. 54, states that they do not, but quotes no authority.)

Liability of Signer in Question with Party taking the Bill blank.—In order that the signer of the blank bill may be liable upon it, in a question with the party to whom it is granted, or with anyone who is not a holder in due course, it must be filled up in accordance with the authority given. Thus *A.* granted a blank acceptance to *B.* for his accommodation. *B.* kept it without filling it up, until after he had been sequestrated and discharged and then filled it up and put it in circulation. It was held that he was liable in damages to *A.* for doing so, because the mandate to fill up the bill given

to him was necessarily determined by his sequestration (*M'Meekin*, 1881, 8 R. 587; and see *Jackson*, 1875, 2 R. 882). But it has been held in England that if the blank bill has been given in payment of a debt, the death of the signer does not determine the authority to fill it up (*Carter*, 1883, 25 Ch. D. 666). The signer of a bill would seem to be entitled to prove by parole that the bill had been filled up contrary to the authority given (Bills of Exchange Act, 1882, s. 100).

Liability in Question with Holder in due course.—The question is different if the bill has been transferred to a holder in due course. But as a condition of a party attaining the position of a "holder in due course" is that he has taken the bill "complete and regular on the face of it," a man to whom a blank bill is transferred before it was filled up, or who was present as the time it was filled up, cannot be a holder in due course (Bills of Exchange Act, 1882, s. 29). Thus when *A.* obtained from *B.* a blank acceptance, and improperly filled it up after *B.'s* death, and passed it for value to *C.*, who was present when it was filled up, it was held that *C.* was not a holder in due course, and could not recover from *B.'s* executry estate (*Hatch*, 1854, 2 S. & G. 147). If, however, the bill is filled up and transferred to a party who takes it for value, and without notice of any defect in the title of the party from whom he took it, the party so taking it is a holder in due course, and may enforce payment from all parties liable on the bill, without regard to personal defences available to prior parties between themselves (Bills of Exchange Act, 1882, s. 38). Even if the manner in which the blank bill has been filled up amounts to a forgery, a holder in due course can enforce it. Thus where *A.* signed a blank bill, and wrote a sum in figures in the margin, and a figure was afterwards inserted in the amount so written, and the bill accordingly filled up for the amount thus appearing, it was held that, as the figures on the margin were no part of a bill, *A.* had delivered a blank acceptance, and was liable for the whole amount, in a question with a holder in due course (*Garrard*, 1882, 10 Q. B. D. 30; Bills of Exchange Act, ss. 24 and 64). But a party has been held not to be liable on a blank bill if he never delivered it. So when *A.* signed a bill stamp, and put it aside in his drawer, and it was stolen and filled up, it was held that *A.* was not liable even to a holder in due course, on the ground that he had never delivered the bill (*Baxendale*, 1878, 3 Q. B. D. 525).—[See Byles on *Bills*, 15th ed., p. 92; Thorburn, *Bills of Exchange Act*, p. 53; Chalmers, *Bills of Exchange Act*, 4th ed., p. 49.]

Blank Bonds.—A bond which is blank in the substantive part of the deed,—for instance, in the sum due under it,—is ineffectual at common law, and the omission cannot be supplied by parole evidence (Dickson, *Evidence*, ss. 658, 1076). But in the seventeenth century bonds were commonly granted blank in the name of the granter, and were held to be valid. To prevent this practice the Act 1696, c. 25, "anent blank bonds and trusts," was passed. On the preamble that such deeds are occasions of fraud, the Act provides that "no bonds, assignations, dispositions, or other deeds be subscribed blank in the name of the person or persons in whose favour they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery, certifying that all writs otherwise subscribed and delivered blank as said is, shall be declared null." The "endorsations of bills of exchange, and the notes of any trading company," are excepted.

Deeds struck at by Act 1695.—The operation of this Act is not limited to bonds, but extends to other deeds. Thus an entail (*Kennedy*, 1722, Mor. 1681; *Abernethie*, 1835, 13 Sh. 263), and a trust-deed (*Pentland*, 1829, 7 Sh. 640), have been held to be struck at. In such cases, however, if the blank is merely in the clause declaring the name of the substitute, the effect is that the substitution is void, but the deed is not invalid in other respects (*Abernethie, cit.*). An ordinary bond issued blank in the name of the granter would certainly be invalid, unless its issue was sanctioned by Statute. The Act does not apply to bills (Bell, *Com.* (M'L. ed.), i. 416; *Fair*, 1801, Mor. 1677; see BLANK BILLS), nor to cheques (*M'Gilchrist*, 1794, Mor. 877), nor to promissory-notes, nor to bills of lading (Bell, *Prin.*, s. 417; 18 & 19 Vict. c. 111). But an obligation conceived as a mere promise to pay, not addressed either to a named person or to bearer, is not a promissory-note, and is void under the Statute (*Macdonald* (*Duncan's Tr.*), 1872, 10 M. 984). It is not settled whether the Act applies to obligations undertaken by merchants or manufacturers in the form of delivery orders or warrants. In *Bovill* (1854, 16 D. 619, affd. 1856, 3 Macq. 1), an iron warrant expressed as an obligation to deliver to the person presenting it, was held good, and the decision was repeated, with express reference to the Act 1696, in *Dimmack* (1856, 18 D. 428). But, on the former case being subsequently appealed to the House of Lords, L. C. Cottenham, who was the only law lord present, expressed the opinion that documents of this kind, expressed as a floating obligation in favour of any person into whose hands they might happen to come, were void both at common law and under the Statute, unless supported by a custom of trade. Since that decision it has been usual to issue iron warrants and similar documents in the form of an obligation to deliver to a person named or his assignee, and the question as to the effect of the Act 1696 has not been again raised (*Merchant Banking Co.*, 1877, 5 Ch. D. 205; *Connal & Co.*, 1868, 6 M. 1095). It is possible that if the question were again raised with regard to instruments in blank, it might be held that a custom of trade had arisen to treat such orders, however expressed, as valid transfers.

Deeds to Bearer.—The ordinary meaning of the words "blank in the name of the person in whose favour they are conceived," is that the deed in question should have a space left vacant for the name of the grantee. But it would appear, though it is perhaps not settled beyond question, and although an opinion to the contrary was given by Lords Cowan, Mackenzie, and Handyside, in the case of *Dimmack* (1856, 18 D. 428, p. 442), that it is applicable also to bonds or obligations conceived in favour of the bearer, or the holder, or not expressed in favour of any party at all (Ersk. iii. 2. 6; opinion of L. C. Cottenham in *Bovill*, 3 Macq. 1; *Walkingshaw's Exors.*, 1730, Mor. 1684; *Macdonald* (*Duncan's Tr.*), 1872, 10 M. 984). It is therefore probable that a bond payable to bearer, if issued by a party or company domiciled in Scotland, would be invalid, unless it rested upon the express authority of some particular Statute. The principle would appear to be that the identity of the granter must be ascertainable from the deed, and therefore that a bond in favour of the bearer is really blank (Ersk. iii. 2. 6). But the Act does not apply to cases where the granter, though not mentioned by name, is described sufficiently for identification. Thus a cautionary obligation for a composition in favour of the "creditors of H.," was held to be good (*Clapperton, Paton, & Co.*, 1881, 8 R. 1004).

When Blanks may be filled up.—In the case of deeds or bonds containing actual blanks, the requirements of the Statute are, that they should be

filled up either (1) before or at the subscribing, or (2) before delivery, in the presence of the same witnesses who witnessed the subscription. Thus, when a deed was sent home from India subscribed, but with blanks which were to be filled up according to a separate letter of instructions, it was held that this deed was struck at by the Act (*Pentland*, 1829, 7 Sh. 640; cf. *Abernethie*, 1835, 13 Sh. 263). When the validity of a deed is in question, after its delivery, and it appears from ocular inspection that the name of the granter has been filled in after the deed was written, it would appear that the general rule is, that the deed must be presumed to have been completed at the date which it bears, and that it is therefore effectual (*Ruddiman*, 1746, Mor. 11562; Ersk. iii. 2. 6), though this presumption might be displaced by the fact that the name of the granter was in a different handwriting from the rest of the deed (Dickson, *Evidence*, s. 609).

Notes of Trading Companies exempted.—It has never been decided what exact interpretation is to be given to the phrase "notes of trading companies," which are excepted from the provisions of the Act. It probably originally referred to documents of the nature of bank notes, and was held to include cheques (*M'Gilchrist*, 1794, Mor. 877). It might now be held to exempt bonds in favour of the bearer, if issued by a trading company, from the operation of the Act. The question, What is a trading company? has been considered in England, in reference to the capacity of the company to become a party to a bill of exchange, and it has been held that the term cannot be applied to a railway, mining, cemetery, gas, salvage, or waterworks company (*Bateman*, 1866, L. R. 1 C. P. 499; other authorities at p. 505). [Stair, i. 4. 17, iii. 1. 5; Ersk. iii. 2. 6; Bell, *Com.* ii. 15; Bell, *Prin.* s. 1459; Bell, *Convey.* i. 239; Menzies, *Convey.* 133; Dickson, *Evidence* (Grierson's ed.), ss. 650–659.] See BLANK BILL; BLANK TRANSFER.

Blank Days.—The sederunt days during session, both for the Divisions and for the Lords Ordinary, are Tuesday to Saturday inclusive. Until 1868, however, there existed a custom whereby each Lord Ordinary was entitled to refuse to sit on one of the sederunt days: these days were called blank days. By the Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 6, blank days were abolished, and in place thereof it was enacted that on one sederunt day in each week the Lords Ordinary, in rotation, should not call their debate or motion rolls, but should sit for the purpose of taking proofs or presiding at jury trials in causes depending before them respectively. The days thus set apart are still called blank days.

Blank Deeds.—Deeds containing blanks *in substantialibus, e.g.* in the name of the property disponed, or in the name of the disponee, where there is no substitution, are ineffectual at common law (*Abernethie*, 1835, 13 S. 263; cf. *Pentland*, 1829, 7 S. 640; *Buchanan*, 1828, 6 S. 986; *Duncan's Trs.*, 1872, 10 M. 984; *Robertson*, 1844, 7 D. 236, per L. Fullerton). What points are *de substantialibus* must depend upon the nature of the writ (Stair, iv. 42. 19). But an ambiguity, occasioned by blanks, may be overcome, if, by the terms of the deed (see *Pentland, ut supra*; *Kennedy*, 1722, Mor. 1681), a discretion is vested in someone to fill up the blanks (*Murray*, 1749, Mor. 4075; *Snodgrass*, 1806, M. App. "Service of Heirs," No. 1; *Ewen*, 1830, 4 W. & S. 346, commented upon per L. Ch. Chelmsford in *Mags. of Dundee*, 1858, 3 Macq. 134; cf. also *Stewart*, 26 Nov. 1813, F. C.). The fact that a deed contains blanks, or that blanks therein have been irregularly

filled up, does not necessarily invalidate the whole deed (*Abernethie, ut supra*). If a clause be blank at the time of signature, the *onus* rests on the person relying upon that clause filled up after signature, to show that it was filled up with the knowledge and consent of the granter (*Buchan*, 1857, 19 D. 551; cf. *Wylie & Lochhead*, 1889, 16 R. 907).

Spoken declarations, papers of instructions, and drafts or copies of the deed in question are inadmissible for the purpose of filling up a blank (*Blair*, 1849, 12 D. 97, which upon this point may be regarded as discrediting *Pollock*, 1777, Mor. 8098; see M'Laren, *Wills*, i. 396).

At one time bonds were frequently executed blank in the name of the creditor, and passed from hand to hand like notes payable to the bearer (Stair, iii. 1. 5; Ersk. iii. 2. 6). Such bonds were prohibited by the Act 1696, c. 25, which provided that "no bonds, assignations, dispositions, or other deeds be subscribed blank in the person or persons' name in whose favours they are conceived, and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses who are witnesses to the subscribing before the delivery, certifying that all writs otherwise subscribed and delivered blank as said is, shall be declared null." The Act applies to trust deeds blank in the names of all the trustees (*Pentland*, 1829, 7 S. 640; see *Robertson, ut supra*); and to deeds of entail executed before the names are filled in (*Abernethie, ut supra*). But the fact that such a deed was blank in the name of the last substitute was held not to affect the prior heirs whose names were inserted before subscription (*ib.*). Where there is a description of the grantees in which *constat de personis*, the Statute's requirement is satisfied (*Clapperton, Paton, & Co.*, 1881, 8 R. 1004). The Act strikes at a deed filled up according to the granter's directions contained in a writing, not the deed itself, and outwith the presence of the witnesses to the deed (*Pentland, ut supra*; *Kennedy*, 1722, M. 1681). If it be clear that the grantee's name was originally blank, the *onus* of proving that the deed was duly completed will rest on the person founding on it (*Donaldson*, 1749, Mor. 9080. The writings, under consideration in *Sinclair*, 1746, Mor. 11559, and *Ruddiman*, 1746, Mor. 11562, referred to by Erskine, iii. 2. 6, were dated before the Act 1696, c. 25). But where the testing clause states that the blank was filled up in terms of the Statute, the *onus* of controverting that statement will rest on the challenger of the deed (Dickson, *Evidence*, s. 659; cf. *Smiths*, 1877, 5 R. 97; 1878 5 R. (H. L.) 151; appr. in *Assets Co.*, 1896, 23 S. L. R. 539).

The Statute expressly declares that it "shall not extend to the endorsation of bills of exchange or the notes of any trading company" (see *Duncan's Trs., ut supra*). Bills, notes, and documents, which by general mercantile usage are drawn blank or to bearer, and pass without assignation, are also exempt (*Dixon*, 1856, 3 Macq. 1; see also *Commercial Bank*, 1859, 21 D. 864; *Connell & Co.*, 1868, 6 M. 1095; *Hamilton*, 1873, 1 R. 72).

[See Stair, i. 4. 17, iii. 1. 5; Ersk. iii. 2. 6; Menzies *Conveyancing*, 132; Bell, *Conveyancing*, i. 239; M'Laren, *Wills*, i. 282; Dickson, *Evidence*, s. 650 *et seq.*, 1076; Taylor, *Evidence*, ss. 164, 1156, 1835–7.] See Bills of Exchange; Bills of Lading; Executions; Testing Clause.

Blank Transfers.—The phrase denotes a transfer of shares in a company, executed by the transferor, but blank in the name of the transferee, and usually blank also as to the date and the sum paid as consideration for the transfer. Such transfers are in use (1) as a means of transferring the property in shares, particularly in those cases where the

company has issued share certificates with transfers printed on the back; (2) as a means of constituting a security over shares, by depositing with the security-holder the share certificates together with transfers made out in blank. There has as yet been no decision in Scotland as to the adequacy of a blank transfer as a means of conveying the right to a share in a company, but their effect has been considered in several cases in England.

Effect of Blank Transfer when Shares transferable only by Deed.—The question as to the effect of a blank transfer in England seems to depend materially upon whether the regulations of the company require that the transfer of shares should be by deed (a provision contained in the Companies Clauses Acts), or whether "an instrument in writing" is sufficient. (See *Companies Act*, 1862, Sched. i. Table A. Act 8; Buckley, *Companies Acts*, 6th ed. p. 453). In the former case it is held that a blank transfer is not the deed of the party who has executed it in blank, and that it gives the party to whom it is given no authority to fill up the blanks and send it to the company for registration (*Taylor*, 1859, 4 De G. & J. 557; *Société Generale de Paris*, 1885, 11 App. Ca. 20; *Powell* [1893], 1 Ch. 610 & 2 Ch. 555; Buckley, *Companies Act*, 6th ed. p. 453). Thus where a bank made an advance upon shares which stood *ex facie* in the name of a party of whom the borrower was the executor, and afterwards filled up the transfers in their own name, and were registered as the owners of the shares, it was held that, as the transfer required to be by deed, the bank had not obtained the legal title, but only an equitable interest in the shares, and therefore took them subject to all equities which were binding on the transferor. It appeared that the transferor really held these shares in trust for a third party, and it was held that that third party had a right to recover them from the bank (*Powell, cit.*; *Roots*, 1888, 38 Ch. D. 485). But the transferor in blank has a right in equity to demand a legal transfer, and thereby to obtain a right to become the registered owner of the shares (*Powell* [1893], 2 Ch. 555).

Effect when Deed not required.—When there is no provision that the transfer of shares should be by deed, the holder of a transfer in blank has obtained a much stronger position. He has not obtained the legal title to the shares, but he has an authority from the transferor to fill in his own name as transferee, and the right to complete his title by having his name placed on the register (*Colonial Bank*, 1887, 36 Ch. D. 36; *Bentinck* [1893], 2 Ch. 120). The position of a party who has obtained a blank transfer with the share certificates, in cases where a transfer by deed is not required, is described as follows by an American judge:—"By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company by the registered holder to a *bona fide* purchaser. But, in this respect, he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation for allowing such a transfer in violation of his rights. He also takes the risks of the collection of dividends by his assignor, or of any lien the company may have on the shares. But in all other respects his title is complete" (Rapallo (J.), in *M'Neil*, 1871, 7 Amer. Rep. 341).

Blank Transfers a good Security in England.—When blank transfers and certificates are deposited in security, the depositary obtains in England a security which will be good in the bankruptcy of the transferor, whether his title at the date of the bankruptcy be legal or merely equitable (*Colonial Bank*, 1886, 11 App. Ca. 426).

Question as to effect of Act 1696, c. 25.—The effect of a blank transfer in Scotland is not complicated by any distinction between shares requiring to be transferred by deed and shares transferable by an instrument in writing. But it is very possible that a blank transfer might be held to be null as an obligation under the Act 1696 c. 25 "anent blank bonds and trusts." This Act strikes at instruments delivered blank in the name of the granter, and its operation is not confined to bonds, but extends to other deeds. (*Pentland*, 1829, 7 S. 640). There is, indeed, a somewhat vague exception to the Act, by which it is probable that documents *in re mercatoria* are exempted from its provisions, but it does not appear likely that a transfer of a share, an instrument which requires to be authenticated by witnesses, would be held to fall within that class. In one case the objection was taken that the share transfers (which were afterwards registered) had been delivered in blank, but it was held upon the evidence that the plea was not supported by the facts, and no decision was pronounced upon it (*Shaw*, 1890, 17 R. 466). Even if a transfer was held to be void under the Act, because executed in blank, the holder has no doubt a right to demand a transfer fully made out. But it is doubtful whether this demand could be enforced after the bankruptcy of the transferor.

Blank Transfer as a Security in Scotland.—Assuming that blank transfers were held not to be struck at by the Act 1696, c. 25, it is still a question what right they confer upon the person to whom they are given, either with the intent of transferring the shares, or of creating a security over them. There is little doubt that they import an authority from the transferor to the transferee to fill up the blanks and have his name placed upon the register, and that in a question with the transferor himself the transferee has a good title to the shares. It is, however, of more importance, particularly in the case of a transfer in security, to consider whether he has a right, or a means of obtaining a right, which will be good in a question with the trustee in the bankruptcy of the transferor. The answer to the question depends on the means by which the incorporeal right, represented by a share in a company, may be transmitted in Scotland.

Legal Requirements of a Transfer of Shares.—The law on this point may be given in the words of Lord Neaves—"Mere assignation is not the proper mode of completing a right of this kind. Assignation is the transmission of a *jus crediti*. In its original conception it was a mandate from the cedent to the assignee, to recover a debt due to him. The purpose of intimation is twofold, to prevent the debtor from paying to the original creditor, and to show that the assignee is henceforth to be held as the proper and sole creditor. These principles are not applicable to the transfer of a bilateral right like partnership, a position involving both active and passive consequences, both rights and liabilities. There must be some proceeding necessary to complete the transfer, amounting to a claim on the part of the transferee to exercise the rights of a partner, and an agreement on his part to assume the liabilities of a partner." "The transmission of shares in a company is a thing *sui generis*, to be governed, not by the rules which regulate the transmission of a unilateral debt, but by the necessity of the transferee asserting the position of a partner" (Lord Neaves, in *Morrison*, 1876, 3 R. 406, at p. 409).

Security by Assignation not sufficient.—From the above opinion it is clear that a mere assignation of the shares, even although intimated to the company, will not transfer to the assignee the right of the cedent, nor give him any claim over the shares preferable to that of the trustee in the bankruptcy of the cedent. Thus transfers were made out and given to *A.*,

who, however, did not send them in to be registered until after the transferor's sequestration. The trustee in the sequestration brought a reduction of his right, on the ground that he had held, by virtue of the act and warrant of confirmation in his favour, an intimated assignation to the shares as at the date of the sequestration (Bankruptcy Act, 1856, 19 & 20 Vict. c. 74, s. 102), and was therefore preferable to the unintimated right then held by *A*. It was decided that priority of intimation was not the criterion of preference, and that *A*., who had become a partner in the company before the trustee had done so, was preferable (*Morrison*, 1876, 3 R. 406; see *Thomson*, 1842, 5 D. 379).

Security by Actual Registration.—It is clear that the most regular method of completing a security over shares in a company would be for the security-holder to be registered as a shareholder, and to grant a back-letter setting forth the terms upon which he is bound to said transfer. Such a method was adopted by a bank in a recent English case (*Bentinck* [1893], 2 Ch. 120). But it is open to practical objections, on the score of the expense of the transfers, of the liability which the security-holder may incur by becoming a shareholder, and of the notoriety which the transfer may give to the transaction. It is especially inapplicable to the case when the transferor is a director, and holds his shares as his qualification, or when he is an officer of the company, on the condition that he should hold a certain number of shares. Methods have therefore been devised whereby the security-holder may obtain a right higher than that of an assignee, without actually becoming a shareholder in the company.

By Deposit of Certificates.—The mere deposit of the certificates, unaccompanied by any transfer, is to a certain extent a security, inasmuch as it puts a serious practical difficulty in the way of the shareholder transferring the shares to a third party. And in England it may give the creditor the right of an equitable mortgagee of the shares (*Société Generale de Paris*, 1885, 11 App. Ca. 20; *Colonial Bank v. Whinney*, 1886, 11 App. Ca. 426; Buckley, *Companies Acts*, 6th ed., p. 454).

But equitable mortgage by deposit of title-deeds is not a form of security known in Scotland (*Christie*, 1862, 24 D. 1182; *Robertson*, 1891, 18 R. 1225). And in one case it was assumed that the mere deposit of certificates, in security for an advance, gave the depositary no security, and held that a transfer executed afterwards in his favour, but within sixty days of the bankruptcy of the debtor, was reducible under the Act 1696, c. 25 (*Gourlay*, 1887, 14 R. 403).

By Transfers fully made out.—The deposit of certificates, together with transfers fully made out, does not indeed complete a security over the shares, because it does not make the depositary a partner in the company, but it gives him a right to become a shareholder by sending the certificates and transfers to the office of the company for registration. And it has been held in the Outer House, and acquiesced in, that the security-holder had the right to complete his security by obtaining registration even within sixty days of the bankruptcy of the transferor, and that his right, when so completed, was not reducible under the Act 1696, c. 25 (*Guild, Kettle's Tr.*, 1884, 22 S. L. R. 520). He is probably also entitled to complete his right even after the sequestration of the transferor, and will be preferable if he applies for registration before a similar application is made by the trustee (*Morrison*, 1876, 3 R. 406).

Effect of Security by Blank Transfer on Bankruptcy of Transferor.—The chief reason for creating a security by blank instead of completed transfers is, that the security-holder thereby obtains a right which he, in his

turn, can make use of as a security, because transfers in blank usually pass from hand to hand by mere delivery. It has yet to be decided whether the authority to complete a security which is conferred by the delivery of a blank transfer (assuming that such instruments are not struck at by the Act 1696, c. 25), will entitle the holder of it to fill up the blanks and go upon the register, even after the bankruptcy of the transferor. The general rule would appear to be, that an inchoate right may be completed after the bankruptcy of the granter, provided that its completion depends upon some act which the grantee may do without the concurrence or assistance of the granter (*Guild, Kettle's Tr.*, 1884, 22 S. L. R. 520; *Scottish Provident Institution*, 1888, 16 R. 112), and, therefore, if the blank transfer confers a right to go upon the register, and not merely a right to demand a valid transfer, it would seem likely that the holder can complete his right by being registered as a shareholder even after the bankruptcy of the transferor.

Blank Transfers in Hands of Third Parties—Quasi-Negotiability.—When a transfer is executed in blank, and handed over with the share certificates, it passes from one party to another by mere delivery. Questions in consequence have arisen as to the rights acquired by a party who has taken such documents in good faith and for value, without any notice that his author had no right to transfer them. What right can such a party assert over the shares in a question with the registered shareholder, who issued the transfers in blank? It is not, perhaps, possible to answer the question definitely. It is decided in England that certificates with transfers endorsed on the back are not, even if these transfers are executed in blank, negotiable instruments (*Colonial Bank*, 1890, 15 App. Ca. 267; *France*, 1884, 26 Ch. D. 257). Therefore, if they are transferred by a person who has no title at all, such as a thief or finder, the party taking them, though himself in good faith, would acquire no right to the shares. And when *A.* deposited share certificates with blank transfers with *B.*, and *B.* pledged them with *C.* for his own debt, it was held that *C.* had no higher title than his author had, and could not assert against *A.* any right to retain the shares which would not have been good in a question between *A.* and *B.* This was held on the ground that when a person takes an instrument containing blanks, he is put on his inquiry as to what the actual right of the party from whom he takes it is (*France*, 1884, 26 Ch. D. 257). But where the transfers and certificates are issued in a state in which they are "in order," that is, in a state in which they would be accepted by mercantile men without further inquiry, it would seem now to be held that the owner of the shares is estopped by his conduct in so issuing them from denying, in a question with a *bonâ fide* holder for value, that the party to whom they were issued had a right to transfer them. Thus executors gave to their stockbrokers certificates with transfer executed in blank, in order to have the shares transferred to their name. The stockbroker fraudulently pledged them with a bank, while still in blank. It was held that certificates with transfers signed by an executor of the party whose name appeared as owner of the shares were not "in order," and, therefore, that the bank obtained no better title than their author had (*Colonial Bank*, 1890, 15 App. Ca. 267). But Lord Herschell, dealing with the case of transfers executed by the registered owner, expressed himself as follows:—"The case seems to me to differ essentially from that of a transfer signed by a registered owner. He must presumably have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he intrusts it on that condition to a

third party, I think those dealing with that third party have a right to assume that he has authority to complete a transfer" (*Colonial Bank*, cited *supra*; Lord Herschell, p. 286). And it has been held in America that certificates with blank transfers, when executed by the registered shareholders, were negotiable by estoppel, that is, that the transferor was estopped from denying to a holder for value that the person to whom he transferred them had authority to dispose of them (*M'Neil*, 1871, 7 Amer. Rep. 341).

Duty of Company when Transfer sent for Registration.—The duty of a company when a transfer is lodged with them for registration is to notify to the registered shareholder. Their further duty, if the registered shareholder intimates an objection, has been described by Lord M'Laren as follows:—"I rather think that when a company is called upon to register a transfer of stock, which is purely a ministerial proceeding, and they receive intimation from some other person that he has an interest in it, their true position is to say, 'Unless you follow up your intimation by an application for interdict, or some other legal measure, we will register the transfer'" (*Shaw*, 1890, 17 R. 466).—[See Buckley, *Companies Acts*, 6th ed., p. 453; Lindley, *Company Law*, 5th ed., p. 471.]

Blasphemy.—This offence consists in cursing at or reviling and insulting divine beings, doctrines, or ordinances. It is criminal at common law and by Statute. By the Act 1661, c. 21, it is provided "that whosoever, hereafter, not being distracted in his wits, shall rail upon, or curse God, or any of the persons of the blessed Trinity, shall be processed before the Chief Justice, and being found guilty, shall be punished with death." This Act was repealed by 53 Geo. III. c. 160, s. 3, and the crime of blasphemy fell to be dealt with by the common law, as before 1661. In 1825 an Act was passed (9 Geo. IV. c. 47) to restrict the common-law pains of blasphemy, sedition, and leasing-making. This Statute enacted that the punishment of these offences was to be fine or imprisonment, or both. A second offence might be punished with banishment from the United Kingdom. The part of this Act which imposes a penalty of banishment for a second offence was repealed by 7 Will. IV. c. 5. Blasphemy may be spoken or written. Spoken blasphemy would now be prosecuted at common law as a breach of the peace. The sale of blasphemous writings is an offence which may be dealt with summarily, or on indictment. See ATHEISM; PROFANITY; SABBATH-BREAKING.

Blazon.—The badge of a messenger-at-arms, by the exhibition of which he notifies his official character. (See IMPRISONMENT, CIVIL; DEFORCEMENT.) (Bell, *Com.* ii. 436; Campbell, *Citation and Diligence*, 252, 471.) The blazon consists of small plate of brass or silver, on which the Royal Arms are stamped. It is fixed to the breast of the messenger's coat. (Darling, *Messenger-at-Arms*, p. 13.)

Bleaching.—(1) *As a Servitude.*—Bleaching is a servitude recognised by the law of Scotland, though it is not one of the particular servitudes mentioned in Roman law or the older constitutional writers. In 1708 a majority of the Court of Session held that no such servitude was known according to our law (*Falkland*, Mor. 10916). But, later, the Court of Session held that liberty to bleach was a servitude which could be acquired

(*Jaffrey*, 1755, Mor. 14517; *Sinclair*, 1779, Mor. 14519); and the House of Lords affirmed the judgment in the latter case (2 Pat. 554). The right to bleach may be acquired by inhabitants of a burgh (*Home*, 1846, 9 D. 286). The servitude carries with it the right of access to the ground used, and of taking water for the purpose of bleaching (*Home, ut supra*)

(2) The process of bleaching was introduced into Scotland from Holland in the early part of the eighteenth century, and many bleaching and dyeing works were established in various parts of the country. In 1845 the first of a series of Acts was passed regulating the employment of women and children in bleaching works. All these Acts were repealed by the Factory and Workshops Act of 1870, which applied the Factory Acts to bleaching and dyeing works. The last-mentioned Act is repealed; but bleaching works are declared to be non-textile factories, and are regulated by the Factory and Workshops Act of 1878 (41 Vict. c. 16).

(3) *Bleacher's Lien.*—A bleacher has a lien over goods sent to him. Not only has he a lien over each parcel of goods for work done on that parcel, but he has also a further lien over goods sent to him for the balance of his whole account for work done for the sender within the year (*Anderson's Trs.*, 1871, 11 M. 718).

[Rankine on *Landownership*, 367; Bell, *Com.* ii. 104, note; Bell, *Prin.* s. 1435; Ersk. iii. 4. 21; Redgrave, *Factory Acts*, 6th ed.]

See Servitude; Lien; Factory and Workshops Acts.

Blench.—Blench (or blanch) is that tenure by which a vassal holds lands for an elusory yearly duty payable rather as an acknowledgment of, than as a profit to, the superior. The yearly duty may be either in money, as a penny Scots, or in some other subject, as a pound of wax or pepper. The *reddendo* clause in a blench-charter may stipulate simply for payment or fulfilment of the duty, or it may stipulate for payment or fulfilment of the duty *si petatur* or *si petatur tantum*. If the *reddendo* clause stipulates simply for payment or fulfilment of the duty, the duty, if it is a thing of yearly growth, cannot be exacted unless it is demanded within a year after it becomes payable by the *reddendo*; but if it is not a thing of yearly growth, it can be exacted at any time within the years of prescription. If, on the other hand, the *reddendo* stipulates for payments or fulfilment of the duty *si petatur* or *si petatur tantum*, the vassal is relieved from the annual duty, whether it is a thing of yearly growth or not, if it is not demanded within the year. As by sec. 3 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), the word "feu" includes "blench," and the word "feu-duty" includes "blench-duty," the annual duty in grants made after the commencement of the Act, of land to be held by the tenure of blench, must be of fixed amount or quantity; but it is competent to stipulate for a permanent increase or reduction of the duty if the amount thereof is certain, and if the time or times at which such increase or reduction is to have effect are also certain (s. 23). The casualties incident to the tenure of blench are the same as those incident to the tenure of feu.

Mr. Duff says that this tenure arose when feudal manners began to give place to a certain degree of industry and civilisation (Duff, 49), and grants to be held by the tenure of blench were often formerly granted because the granter desired to confer on the grantee a free gift for distinguished services,—*ob praeclara in rem publicam merita et partam bello gloriam*, or because the grantee had paid a capital sum to him in lieu of future annual prestations. For these reasons, the use of a blench-charter may still be

resorted to; but that charter has fallen almost completely into disuse. Now a feu-charter stipulating for an elusory feu-duty is invariably used where formerly a blench-charter would have been granted (*Juridical Styles*, i. 34). The *tenendas* in a blench-charter formerly bore to be *in libera alba firma*: the *tenendas* in the blench-charter in its modern form bears to be in blench-farm. In a case of doubt there was a presumption against the tenure of blench. Even although the *reddendo* in a charter bears that the duty under it is payable *si petatur* or *si petatur tantum*, the tenure, according to Stair, is not to be accounted blench if it is not also expressed to be payable *nomine albæ firmæ*,—in name of blench-farm (Stair, ii. 3. 33).

Blind Persons, Execution of Deeds by.—A person who is blind, but is able to sign his name, has a choice of two ways of executing deeds. He may either sign the deed himself before witnesses or execute it notarially. In the Court of Session a deed subscribed by a blind person was reduced on the ground that the subscriber had not had the deed read over to him before he signed it (*Earl of March*, 1735, 5 Bro. Supp. 840); and a deed executed notarially by a blind person was reduced because it was not read over before signature in presence of the granter and the notaries (*Ross*, 1792, Mor. 16853). But the House of Lords held that the reading over of the deed to the granter prior to signature is not a necessary solemnity, whether the deed is signed or executed notarially by the granter (*Earl of Fife*, 1823, 1 Sh. App. 498; *Ker*, 1837, 15 S. 983; *Reid*, 1 Rob. App. Ca. 66). To reduce a deed signed by a blind person, it must be proved that he did not know its contents when he subscribed it; and the fact that the deed had not been read over to him may be proved, though it is not conclusive evidence that the granter did not know the contents of the deed. Professor Montgomery Bell suggests that where a blind person who can write is executing a deed, it should be authenticated by a notary as well as by the granter's signature. Where persons witness the signature of a blind man, they should see him actually sign the deed, as he cannot acknowledge his signature afterwards. By sec. 41 of the Conveyancing Act of 1874, the deed of a person who is unable to write may be executed for him by one notary public or justice of the peace or parish minister (see Schedule I.). A blind person cannot act as an instrumentary witness to a deed (*Cunningham*, 1824, 2 S. 205).—[Bell, *Lectures*, 46; Menzies, *Lectures*, 109; Stair, ccexli.; Ersk. III. ii. 26; IV. ii. 27.] See DEEDS, EXECUTION OF; NOTARIAL EXECUTION.

Blockade.—The warlike operation known as blockade is the investment by a belligerent's forces of a place or territory in the possession of the enemy with a view to the interception of communication. A blockade may be established by sea or by land, or by both sea and land; but it is only in so far as it is a maritime operation that it becomes the subject of special rules. These are technically known as the law of blockade, and are generally classified by scientific jurists under the heading of International Law, and are assigned specifically to that department of the law of neutrality which defines the rights of belligerent States in respect of the commercial acts of neutral subjects. Recently, however, it has been argued that the law of blockade is rather to be regarded as part of the municipal law of every country; and it may be admitted that colour is given to this view by the circumstance that the jurists and prize courts of

different countries differ in details in their exposition or interpretation of its doctrines. For a discussion of this not wholly academic question, reference may be made to Sir James F. Stephen's *History of the Criminal Law*, 35: J. K. Stephen's *International Law*; Lawrence's *Essays on Modern International Law*, 33. In the present article the traditional view is accepted that the law of blockade is a branch of international law.

A blockade may be established either as part of a military operation, *e.g.* to effect the reduction of the blockaded place, when it is known as a strategic or military blockade; or, independently of any direct military advantage, to cut off commerce, when it is known as a commercial blockade. The most remarkable instance of the latter is the blockade by the Federal States of the Confederate coasts in the American Civil War.

By the establishment of a legally binding blockade, whether military or commercial, a belligerent acquires the right to prohibit neutral merchant vessels access to or egress from the closed port, and to punish acts in violation of blockade performed by neutral subjects who have knowledge of it.

Breach of Blockade.—Three considerations, then, are of importance in connection with the question of breach of blockade.

1. What constitutes a legally binding blockade?
2. How do neutral subjects become affected with knowledge of it?
3. What acts are violations of blockade?

1. "Paper" blockades are no longer, if they ever were, legal, such, for example, as Napoleon endeavoured to set up by the Decree of Berlin, 1806, whereby the British Isles were "declared" to be "en état de blocus," although not a single French squadron was able to put to sea. The general sense of nations on this matter found expression in the Declaration of Paris, 1856, which sets forth (art. 4), "Blockades to be binding must be effective." In the view taken by British and American statesmen, jurists, and prize courts, a blockade is effective when the place is invested with a force sufficient to make ingress or egress dangerous, or, in other words, to render the capture of vessels attempting to pass most probable. Further, according to the view in question, it is not necessary that the blockading ships should be stationary or in close proximity to the port, if the configuration of the coast, the set of the currents, or the neutral character of the adjacent shores render close proximity impossible. Nor, further, is the blockade vitiated by the circumstance that in favourable conditions of weather some neutral vessels have succeeded in eluding the blockading squadron, or that the blockading squadron has been temporarily driven off by stress of weather, or has been temporarily absent for the purpose of pursuing a prize, though pursuit for a considerable distance and length of time will vitiate the blockade.

On the other hand, several Continental writers—Heffter, Calvo, Hautefeuille, Gessner—maintain that, to constitute an effective blockade, the immediate entrance to the port must be guarded by stationary if not anchored vessels in such numbers as to render entrance or exit impossible, or, at anyrate, to expose vessels attempting to pass to a cross-fire. Some of them further hold that any temporary interruption vitiates the blockade.

It may be asserted as beyond dispute that a blockade ceases with the termination of the war, or when the blockading squadron is withdrawn for other than a temporary purpose, or is driven off by the enemy, or when the blockaded port is occupied by forces of the belligerent other than the blockading squadron, when it ceases to be a hostile port, and that relaxation of the blockade in favour of belligerents will vitiate (*The Franciska*, 10 Moo. P. C. C. 37).

2. A blockade not being a necessary consequence of the state of war, neutral subjects are entitled to receive due notice of it before they can be held to be affected with such knowledge of the blockade as will entail penal consequences for breaches. It is not, however, necessary, according to the view adopted in Great Britain, the United States of America, Prussia, and Denmark, that each neutral subject should have received an individual notification before liability is incurred. Notification may be constructive as well as actual. A distinction is drawn by these States between blockades *de facto* and notified or governmental blockades, the former being those which are not, generally speaking, instituted by direct authority of the belligerent Government, but by competent officers, and which are not notified *diplomatically* to foreign powers; the latter being blockades which are instituted by the belligerent Government itself, and of which notice is given diplomatically to neutral Governments. When the blockade is *de facto*, neutral merchant vessels approaching the closed port are entitled each to a notice, which is endorsed on the ship's papers (*Vrouw Judith*, 1 C. Rob. 151). Liability to capture is only incurred for subsequent breaches of blockade. It is otherwise with ships issuing from the port: they cannot claim the privilege of a special warning, if the officer instituting the blockade has notified it to the authorities in the port, or it has been in existence for any length of time. Even in the case of vessels approaching, it would seem that when the blockade *de facto* has been so long in existence as to be notorious, the necessity of a special warning is superseded, though the onus of proving knowledge would be with the captor (*The Franciska*, 10 Moo. P. C. C. 37).

When the blockade has been notified diplomatically to neutral Governments, no individual warning is given to ingoing ships sailing subsequently to the time at which it may be reasonably supposed that such notification has become matter of public knowledge, for notification to a Government includes all the individuals of the nation, and "a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it," unless his ignorance is the result of misinformation by officers of the blockading belligerent's fleet (*The Neptunus*, 2 C. Rob. 111).

On the other hand, France and some other States do not distinguish between blockades *de facto* and notified blockades in the matter of special warning to ingoing vessels. According to French practice, a public notification does not supersede the necessity of a private notice to each neutral trader approaching the blockaded port. The notice is endorsed on the ship's papers, with date and place, and it is only for subsequent attempts to enter that the vessel is liable to seizure. It seems doubtful whether France extends the privilege of special warning to outcoming vessels (cf. *The Eliza Cornish, Pistoye et Duverdy*, i. 387, with the Instructions of 1870 and Negrin, p. 213).

3. It is a violation of a blockade to enter or to attempt to enter a closed port even in ballast; or to approach a port, when the blockade is notified, for the purpose of inquiry; but a blockade *de facto* may be approached for that purpose (*Naylor* v. *Taylor*, 4 Man & R. 531). When the blockade has been diplomatically notified, the mere act of sailing for a blockaded port is sufficient to constitute the offence, and a breach is committed the moment the voyage begins, and prior to any attempt to enter (*The Neptunus*, 1 C. Rob. 111). Where, however, doubt exists as to the intention to actually break blockade, even though the destination of the vessel is the blockaded port, inquiry will be made into all the acts of the vessel; and according as these are favourable to innocence or the reverse,

she will be acquitted or condemned; and vessels sailing knowingly for a blockaded destination, but from a port at a great distance, are not regarded as having violated the blockade by the mere fact of sailing; for the presumption is less that the blockade will be in continuance when they arrive; and they are held entitled to inquire, but not at the blockaded harbour (*The Betsey*, 1 Rob. 334). During the American Civil War, vessels captured while voyaging from one neutral port to another were in some cases condemned where an ulterior blockaded destination was suspected, under the doctrine of continuous voyages. But this would seem to have been an unjustifiable extension of that doctrine (see CONTINUOUS VOYAGES). Vessels driven into a blockaded port by stress of weather or want of provisions are not regarded as guilty of breach of blockade. It is also a violation of blockade to go out or to attempt to go out of the port; but as a rule neutral vessels lying in the port when it is placed under blockade are allowed a certain period—usually fifteen days—within which to depart in ballast, or with a cargo *bonâ fide* bought and shipped before the commencement of the blockade. Permission is also usually granted to a Minister of a neutral State resident in the country of the blockaded port to despatch from it a ship conveying home distressed mariners. When a vessel has violated blockade, the offence is held to attach until the end of the voyage, including the return journey, and the vessel is taken *in delicto* if she is taken in any part of the voyage (*The Welvaart van Pillaw*, 2 C. Rob. 128). The offence, however, is purged should the blockade be raised during the voyage (*The Lisette*, 6 C. Rob. 395).

Penalty.—As a general rule both ship and cargo are confiscated for breach of blockade; but when the owners of the cargo are not identical with the owners of the ship, the cargo is not confiscated if the blockade was not known at the time of shipment, or if the master has deviated to a blockaded port, unless the blockade was known when the ship sailed, when the deviation is assumed to be in the service of the cargo (*The Alexander*, iv. C. Rob. 93; *The Adonis*, v. C. Rob. 258; *The Panagia Rhomba*, xii. Moo. P. C. C. 183).

Contracts in Blockade-Running.—It has been laid down in England that agreements entered into between neutral subjects for the purpose of violating a blockade are not an offence against the laws of the neutral State, and can be enforced (*ex parte Chavasse* re *Grazebrook*, 11 Jurist (N. S.) 400; *The Helen*, 1 L. R. A. & E. 1; cf. *Clements* v. *Macaulay*, 4 M. 583).

[Grotius, *De Jure Belli ac Pacis*, III. i. v. 3; Bynkershock, Q. J. P. i. 4; Vattel, III. vii. 117; Phillimore, iii. 473; Hall, 718; Wheaton (Dana's ed.), 668; *The Armed Neutralities*, 1780 and 1800, C. de Marten, *Recueil*, i. 193, and ii. 215; *Declaration of Paris*, 1856; Heffter, 155; Ortolan, ii. 328; Calvo, 2567; Gessner, 179.]

Bloodwit.—This term, which is now obsolete, signifies a riot in which blood is spilt. The suffix *wit* or *wyte* is Saxon, and in our ancient Statutes signified "blame"; cf. 1426, c. 75. Stair points out (ii. 3. 62) that a barony grant comprehended a civil jurisdiction and a jurisdiction in bloodwits, or lesser crimes, but not in those offences which were capital. A baron might, by a subaltern grant, confer upon his vassal a jurisdiction in bloodwits, but not a jurisdiction of a higher character (Bankt. i. 567). The Sheriff is vested with a jurisdiction cumulative with that of the justices in all riots, breaches of the peace, and bloodwits (Ersk. i. 4. 4).

Board of Lunacy.—See LUNACY ACTS.

Board of Supervision.—"The Board of Supervision for relief of the poor in Scotland" was established by the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83, s. 2). It consisted of the Lord Provost of Edinburgh, the Lord Provost of Glasgow, the Solicitor-General for Scotland, the Sheriffs-Depute of Perth, Renfrew, and Ross and Cromarty, together with three members nominated by the Crown, one of whom was salaried, and was in practice chairman of the Board. The Sheriffs also received additions to their salaries in respect of their services. The Board was further intrusted with the enforcement of the Vaccination Act (26 & 27 Vict. c. 108, ss. 5 and 27), with the oversight of sanitary administration (30 & 31 Vict. c. 101), and with duties as to the regulation of dairies (49 & 50 Vict. c. 32, s. 9). The Board of Supervision ceased to exist in September 1894 (57 & 58 Vict. c 58, s. 3), its powers and duties being transferred *en bloc* to the newly created LOCAL GOVERNMENT BOARD FOR SCOTLAND (*q.v.*).

Board of Trade.—See TRADE (BOARD OF).

Board (Fishery).—See SEA FISHERIES.

Board (Parochial).—See PAROCHIAL BOARD; LOCAL GOVERNMENT BOARD.

Board (School).—See EDUCATION; SCHOOL BOARD.

Bonâ fide possessio, in Roman Law.—Under one of the heads of the famous Publician edict, legal recognition was for the first time granted to the position of a *bonâ fide* transferee of a thing by purchase or other sufficient title, who subsequently discovered that his transferor had not been owner, and had no right of alienation. It would have been inequitable, indeed, to have given to such a transferee an action against the true owner, whose property had been disposed of by a stranger behind his back. But as against all the world, except the true owner, the better right of the *bonâ fide* transferee was recognised by the prætor. The *bonâ fide possessio*—or, more correctly, perhaps, *bonæ fidei possessio*—thus introduced by the prætors, was greatly developed by the jurists of the empire, and in the Justinian law, when the term of prescription had been lengthened, and the difficulty of proving property, as distinguished from *bonâ fide* possession, was consequently much increased, the position of *bonâ fide* possessors was carefully defined and regulated.

A person who possesses another man's property in good faith acquires absolute ownership in those fruits of the property which he has consumed (*fructus consumpti*). This rule finds expression in the maxim, *bonâ fide possessor facit fructus consumptos suos*, which is an adaptation of the statement by Africanus in *Dig.* 41. 1. 40. In other words, if the true owner subsequently brings an action against the *bonâ fide* possessor, the latter, though evicted, cannot be compelled to restore the fruits he has consumed

in good faith. If, however, the true owner is successful in vindicating his property, the *bonâ fide* possessor, in addition to restoring the principal thing, is also bound to restore such fruits as are extant, *i.e.* which, though gathered, have not been consumed (*Dig.* xxii. 1, xxv. 1.) From the moment that the action is commenced the possessor must have his suspicions aroused as to whether he is not in possession of another man's property. Accordingly, from the date of *litis contestatio*, he is bound to apply the utmost care (*omnis diligentia*) in cultivating the fruits; and the true owner, on establishing his title, can claim restoration of all the fruits gathered during the action (*fructus percepti*), as well as damages for such fruits as the *bonâ fide possessor* could have gathered by the exercise of due care (*fructus percipiendi*). In a question with third parties other than the true owner, on the other hand, it seems to be the better opinion that a *bonâ fide possessor* became owner of the fruits by the mere fact of separation (*Dig*, 7. 4. 13.; *Dig.* 41. 1. 48 *pr.*; cf. Just. *Inst.* ii. 1. 35.), not even perception or ingathering being necessary (*Dig.* 7. 4. 13.; 22. 1. 25. 1). No distinction is taken between the natural fruits of the earth and industrial fruits, such as rents paid by tenants or the interest paid by debtors (*Inst.* 2. 135; *D.* 22. 1. 45). The *bonâ fide possessor* had an *actio in factum* against all who harmed the moveable property in his possession, even if it were the true owner himself (*Dig.* 9. 2. 17).—[See Pothier, *Propriété*, ss. 334, 342.] For the Scots Law of *bonâ fide* perception and *bonâ fide* possession, see BONA FIDES.

Bona fides—Good faith, honesty, straightforward and upright acting.—It is defined in the Bills of Exchange Act, 1882, s. 90, thus: "A thing is deemed to be done in good faith within the meaning of this Act where it is, in fact, done honestly, whether it is done negligently or not"; and this definition is repeated in sec. 62 (2) of the Sale of Goods Act, 1893 (see *Jones*, 1877, 2 App. Ca. 616, per L. Blackburn, at p. 629). Where the words *bonâ fide* occur as qualifying words in a Statute,—*e.g.* sec. 14 of the Reform Act of 1868, "*bonâ fide* engaged as partners"; Bankruptcy Act, 1856, "expenses *bonâ fide* incurred"; Burgh Police (Scotland) Act, 1892, s. 356, "goods . . . *bonâ fide* the property of,"—they mean actually, really, and exclude presumptions from *primâ facie* appearances.

The doctrine of *bona fides* arose and was developed in the Roman law as an element modifying and correcting the evils consequent on the rigour of the *strictum jus*. Its earliest evidence is to be found in the history of the *mancipatio*, which, contracted *fiduciæ causa*, became a useful method of entering into a great variety of transactions. But the Roman system of legal procedure forbade the consideration by the Court of any latent sub-contract or understanding, any *pactum conventum*, by which the form of the contract as publicly executed was qualified. Thus injustice might be suffered for which there was no remedy. One party might fail to act *ex fide bonâ*, relying on the words of the agreement, to which the Court must give effect, and the other party was left entirely at his mercy. So a new class of actions arose, called *actiones bonæ fidei*, which were in their inception tried not by *judices*, but by *arbitri*. In these the fullest liberty was given to the Court, by the insertion in the formula of such words as "ut inter bonos bene agier oportet et sine fraudatione," of inquiring into the whole circumstances, of exercising its discretion, and giving decree for a sum accordingly. All *bonæ fidei* actions were founded upon contract, and the contracts which might give rise to them were distinguished as

bonæ fidei contracts. Unlike *strieti juris* contracts, the parties to those *bonæ fidei* were bound to perform, not that which was defined in the promises they made, but whatever could be reasonably required in the circumstances. Thus a perfect elasticity was given to the law, and a model has been formed for all succeeding systems of jurisprudence.

In the law of Scotland, the doctrine of *bona fides* is usually found as a plea in defence to a charge of responsibility for illegal or wrongous acting. The defence is that the act proceeded on an honest misapprehension of something which it was not within the duty of the person so acting to know. Where malice is involved in the doing of an act, *bona fides* can be no defence to a charge of liability therefor. But malice, otherwise presumed, may in some cases be eliminated by the fact of privilege or special interest or duty to act, the essence of which as a plea in defence is *bona fides*. In these cases an averment of malice will be required to meet such a plea. Non-compliance with a statutory obligation can never be excused by the good faith of the person on whom it is laid.

Bona fides, being a mental state or condition which is not the subject of physical perception, is to be inferred from facts and circumstances; and the onus of proving these is decided by the rule that *bona fides* is presumed in all acts which are *primâ facie* legal, *mala fides* in those which are *primâ facie* illegal.

Bonâ fide Possession.—A person possesses property *in bonâ fide* who, although his title be radically bad, possesses in the belief, founded upon reasonable grounds, that he has an unquestionable right so to do. It is the duty of the person seeking to oust the possessor to prove in himself a better title; but with regard to moveables it is not sufficient to prove that the property had been his, he must show that its possession was lost in such a way as "to elide the presumption arising from possession" on the part of the holder (More). What constitutes a reasonable ground or *justus titulus* to establish *bona fides* is a question of circumstances, *e.g.* a lease from one infeft, a decree of Court subsequently reversed, or the honest and unsuspecting purchase of an article which had, in fact, been acquired by theft or fraud. The possessor is bound to restore to the rightful owner: and if one has come *bonâ fide* into possession of stolen goods, but has parted with them before his right is challenged, he must restore the price he has received so far as it exceeded what he paid (Ersk. iii. 1. 10; Bell, *Prin.* s. 527; *Scott*, 1704, Mor. 9123). In the case of encroachments upon the minerals of another, *bona fides* will be effectual to avoid penal consequences in an action for damages (*Livingstone*, 1880, 7 R. (H. L.) 1; cf. *Davidson's Trs.*, 1895, 23 R. 45). The amount payable by the encroacher will only be the actual value of the minerals to their owner. See Minerals.

The *bona fides* of the possessor gives rise to certain rights, which cease on the emergence of *mala fides*.

(1) *Bonâ fide possessor facit fructus consumptos suos* was a Roman maxim which does not completely express the Scots law right. With us, separation of the fruit of the subject makes it the property of the *bonâ fide* possessor—consumption is not necessary. But the separation must be in due course, not in anticipation of being dispossessed. Moreover, *messis sementem sequitur*—crops belong to him who has sown them. The rule that fruits belong to the *bonâ fide* possessor includes industrial and civil fruits as well as natural fruits; and rents, interests, etc., are reckoned as belonging to the *bonâ fide* possessor from the time when they become due, although their payment may be in arrear. In virtue of the Apportionment Acts, the civil fruits would seem to accrue to the *bonâ fide* possessor from

day to day (Rankine, *Landownership*, 80). A *malâ fide* possessor must make good to the rightful owner not only those fruits which he actually reaped, but also those which his carelessness or lack of industry prevented him from reaping (*Woolmet*, 1662, Mor. 1730). In the case of civil fruits, he will have to restore with interest, running from a time fixed by the Court, according to circumstances (*Sinclair*, 1847, 10 D. 190; *Macpherson*, 1850, 12 D. 486). The reason of the rule in regard to non-restoration of *fructus percepti* by a *bonâ fide* possessor, is stated by Stair (i. 7. 12) to be "to secure and quiet men's enjoyments, that they may freely use and enjoy that which *bonâ fide* they have, and shun the hazard of their ruin by answering for the bygone fruits" (Stair, i. 7. 10–11, ii. 1. 23–4; More's *Notes*, 50; Ersk. ii. 1. 25–7; Rankine, *Landownership*, pt. i. ch. 4).

The rule can have no application where the consumer admits the sole title to the property to be in another (*Macrae*, 1894, 21 R. 1080). But the plea *bonâ fide percepta et consumpta* has been allowed effect in answer to a claim for repetition of money paid in error, where there was no possessory relation on the part of the consumer to the principal subject of which she had consumed the fruits (*Hunter's Trs.*, 1894, 21 R. 949).

(2) The *bonâ fide* possessor is entitled to be recompensed for meliorations by which the value of the property is enhanced, according to the maxim *nemo debet locupletari alienâ jacturâ*. He is not entitled to recompense for what he has spent in keeping the subject in as good condition as he found it, his occupancy and the fruits being accounted a full return therefor, but only in so far as the permanent value of the property has been increased (*Binning*, 1676, Mor. 13401; *Rutherford*, 1782, Mor. 13422). The amount of recompense is measured by the enhanced value of the property when it comes into the hands of the rightful owner, but must not exceed the amount expended. It is important to note that where possession has been partly *bonâ fide* and partly *malâ fide*, recompense is only due in respect of what has been expended during the *bonâ fide* possession (*Mags. of Selkirk*, 1830, 9 S. 9). Contrary to the opinion of Stair (i. 8. 6), it is now settled that a *malâ fide* possessor is not entitled to recompense for any melioration whatever (Ersk. iii. 1. 11; *Barbour*, 1840, 2 D. 1279; *D. Hamilton*, 1877, 14 S. L. R. 298); but it has not been decided whether he may claim to be refunded *impensæ necessariæ* expended on the preservation of the subject (Rankine, *Landownership*, 84), nor whether he may remove from the ground the materials of buildings he has erected (*Barbour* and *D. Hamilton*, *supra*). The *bonâ fide* possessor alone has a right of retention in security until he is paid what is due to him (More's *Notes to Stair*, 70; Bell, *Com.* ii. 99).

The cesser of *bona fides* and emergence of *mala fides* is coincident with the *conscientia rei alienæ*; and the opinion of Stair (ii. 1. 24), that legal diligence of some sort is necessary to induce this, seems to be accepted in preference to Erskine's (ii. 1. 28) dictum, that private knowledge is sufficient (Rankine, *Landownership*, 76). The point during judicial proceedings at which *bona fides* will be held to cease must depend on the particular circumstances of each case. Erskine (ii. 1. 29) says: "If (the possessor's) title appear by the nature of the action to be lame or inefficient, the citation must induce *mala fides*. Where the question still continues doubtful, *mala fides* is not presumed till litiscontestation, which was at least the general rule of the Roman law. And in instances in which the possessor's case appears uncommonly favourable, he will not be obliged to restore any of the fruits reaped or received by him prior to the sentence pronounced in the suit." L. (J. C.) Moncreiff (*Houldsworth*, 1876, 3 R. 304) stated the principal

rules applicable thus: "First, when the possession has commenced in good faith, it lies with the true owner to show when it ceased to be so, before the right to demand violent profits can prevail. Secondly, when possession has been continued during a litigation regarding the title of the possessor, it is sufficient to support the possessor's plea of *bona fides* that he had *probabilis causa litigandi*; and, third, that the principle is equally applicable whether the possession be challenged in respect of want of title in the possessor's author, or in respect of the nature and conditions of his own right." See VIOLENT PROFITS. A lease of land granted by a *bonâ fide* possessor cannot, on assignation to the true owner, be enforced against the lessee (*Reid's Trs.*, 1896, 33 S. L. R. 443). See LEASE.

Unlike the Roman law, the law of Scotland does not consider *bona fides* requisite to the possession necessary to found prescription (L. Balgray in *D. Buccleuch*, 1826, 5 S. 57); nor is it necessary to give right to a possessory judgment, except in a question with the possessor's author (Rankine, *Landownership*, 11). See BONÂ FIDE POSSESSIO IN ROMAN LAW; POSSESSION; POSSESSORY JUDGMENT; PRESCRIPTION; RECOMPENSE; RETENTION; TEINDS.

BONÂ FIDE PAYMENT.—The rule *bona fides non patitur ut bis idem exigatur* applies wherever a debt has been paid to one who the debtor "had probable ground to think had a right to the debt, but had not" (Ersk. iii. 4. 3; *Sommerville*, 1823, 2 S. 509). Where the debtor could not know (*Tersie*, 1711, Mor. 1783; *Laidlaw*, 1841, 2 Rob. 490; Judicial Procedure Act, 1856, s. 1), or was under no duty of knowing (*Hume*, 1632, Mor. 848; *Home*, 1666, 1 B. S. 522; *M'Gill*, 1716, Mor. 1783; *Alexander*, 1826, 5 S. 185; *Donaldson*, 1833, 11 S. 740), that he was not in safety to pay, the plea of *bona fides* will be sustained. A material factor in support of the plea is the negligence of the true creditor in omitting to make his right known to the debtor (*Lyon*, 1610, Mor. 1786; *E. Strathmore*, 1888, 15 R. 364). If he refrain from acting upon his rights, so as to lead the debtor to the belief that they no longer exist, he will be barred from exacting a double payment (*Robertson*, 1755, 5 B. S. 838; *Garden*, 1757, 5 B. S. 855). As a safeguard to those in right of the rents of land, it is accounted proof of *mala fides* that the rent has been paid before the legal term (*Traquair*, 1667, Mor. 10024); but this rule does not hold in the case of forehand rents (*Haggart*, 1838, 16 S. 1058), nor does it benefit the trustee in bankruptcy of the person to whom it has been paid (*Davidson*, 1868, 7 M. 77). Payment as here used means satisfaction of the debt either in terms or by an equivalent; an acknowledgment of payment where none has been made is ineffectual (Stair, i. 18. 5; Ersk. iii. 4. 8). See EXTINCTION OF OBLIGATIONS; ACCEPTILATION.

BONA FIDES AS AFFECTING STATUS.—Although *bona fides* will not make a union entered into during the subsistence of a prior marriage a good and valid marriage, it seems certain that the *bona fides* of either parent will be effectual to legitimate the children. This was first stated to be the law of Scotland by Craig (ii. 18. 18–19), who has been followed by Balfour (p. 112), Bankton (i. 5. 51), Bell (*Prin.* s. 1625), and Fraser (*P. & C.* 22 *et seq.*), while Stair and Erskine quote Craig's opinion without dissent. The doctrine as stated by Craig, is that all children conceived while either parent remains in *bona fides* are legitimate, and that *mala fides* can only emerge on decree of declarator of nullity (see also *Campbell*, 1747, M. 10456; Bell, *Report of a Putative Marriage*; *Purves's Trs.*, 1895, 22 R. 513). In the case of *Falconer* v. *Falconer*, 5 December 1893 (unreported), a declarator of nullity of marriage and of legitimacy of the offspring, Lord Wellwood in the decree declared the legitimacy of four out of the five

children. The eldest of the five had been born before the marriage. A decree of legitimacy of the offspring of a putative marriage was also pronounced in the case of *Petrie* (1896, 4 S. L. T. 94). Fraser (*P. & C.* 28) thinks that in order to legitimate the children of the second union it must not be an irregular or clandestine marriage, but must be entered into in a public manner with proclamation of banns. This has not been the subject of authoritative decision by the Court, but the case of *Petrie* (*supra*) was one of marriage *per verba de presenti*. The only difference is the difficulty in irregular marriages of proving *bona fides*, where there is no publicity such as a regular marriage ensures (see Bell, *Report*, *supra*; also, *Campbell* and *Lapsley*, *infra*). "*Bona fides*," says Bankton (1. 5. 51), "will be the more easily presumed if the marriage was publicly solemnised than when it was clandestine."

The *bona fides* may be on the part of the spouse who is deceived and kept in ignorance of the prior marriage, or of the spouse who honestly believes that his or her previous marriage has been dissolved by death, or a decree of divorce which is subsequently reversed on appeal. The presumption of law being that all who are not the children of a lawful marriage are illegitimate, the onus of proving *bona fides* is laid on the party pleading legitimacy, who must prove circumstances to which *bona fides* can reasonably be ascribed. The error under which the party alleged to have been *in bonâ fide* laboured must be *justus error* (Craig), *i.e.* "There must be such circumstances as plainly to show that the innocent party had no reasonable cause of suspicion" (L. Glenlee in Bell, *Report*, *supra*; *Lapsley*, *supra*). Mere absence can never establish a presumption of death founding *bona fides*, unless it be for "a very considerable number of years, combined with other circumstances of probability" (L. Monereiff in *Lapsley*, *infra*, 60). The error must also be an *error facti*, not an *error juris*. In *Purves's Trs.* (*supra*), a case of marriage within the prohibited degrees of relationship in which opinions were given by the whole Court, the joint opinion of the Lord President and other four judges contains the following passage (p. 536):—"On the question whether the child of the pretended marriage can make a claim founded on the supposed *bona fides* of the parents, we think that theoretically it is impossible to admit that anyone can be *in bonâ fide* in violating the positive prescriptions of the Statute law, or that any civil rights can flow from such a violation. Everyone is bound to know as much of the law as is necessary to regulate his conduct in the ordinary relations of life, and it cannot be said in this that there was a popular sentiment or opinion that such marriages were legal, which might have induced the parties to think that they were not disobeying the law when they entered into this marriage." The case of a second marriage following on a decree of the Court under the Presumption of Life Act, finding that the absent spouse died upon a certain day, has not yet occurred. Although the children of this second marriage might be legitimate, it is submitted that no *bona fides* could validate this union, and that the rule remains unchanged, that nothing but actual death or a decree of divorce can dissolve a marriage. A finding under the Presumption of Life Act is only *ad certum effectum*, namely, to regulate the disposal of the absentee's property, and cannot affect his status. A question was raised in *Lapsley* (1841, 1 Cl. & Fin., N. S. 498), but not decided, whether a union entered into by a spouse in the *bonâ fide* but erroneous belief in the death of a previous spouse becomes a valid marriage on the subsequent death of the latter. It is thought the Court would hold the marriage good after removal of the impediment, following the

analogy of the marriage of a pupil, which becomes valid by continued cohabitation after puberty (see also *Campbell*, 1867, 5 M. (H. L.) 115).

Fraser (*H. & W.* i. 152) lays down the rules, applicable where one parent is *in bonâ fide*, the other *in malâ fide*, that the spouse *in malâ fide* has no parental authority over the children of the union; and also that the spouse *in bonâ fide* is entitled to all legal rights in the matter of property that would have been competent if the marriage had not been void. As to the last, see *Wright*, 1880, 7 R. 460.

It has not been decided whether the fact that a second marriage has been entered into in the *bonâ fide* belief in the death of a previous spouse, is a good defence to an action of divorce for adultery. See LEGITIMACY; MARRIAGE.

BIGAMY.—*Bona fides* is a good defence to this charge. It completely negatives the element of *dolus malus* essential to the nature of a crime (Hume, i. 461; Alison, i. 539; Macdonald, 201.) It must be proved by the panel upon substantial grounds (case of *John Campbell* in Hume). But a greater readiness will be shown to infer *bona fides* in a criminal charge than where civil rights are concerned (L. Monereiff in *Lapsley*, 1845, 8 D. 59). See BIGAMY.

BONA FIDES IN FIDUCIARY RELATIONS.—The liability of trustees is regulated by the standard of diligence required of them in the administration of the trust. The lack of such diligence, *crassa negligentia* or *culpa lata*, is equivalent to *mala fides*, and no conventional indemnity clause in the deed constituting the trust will afford protection (*Knox*, 1888, 15 R. (H. L.) 83; *Raes*, 1889, 16 R. (H. L.) 31). But where trustees have to account to the public interested in a trust, a greater leniency is admitted in judging their administration than where they have to account to private beneficiaries. In the former case, "if the administration of the funds, though mistaken, has been honest and unconnected with any corrupt purpose, the Court, while it directs for the future, refuses to visit with punishment what has been done in the past" (L. Eldon, quoted by L. Watson in *Andrews*, 1886, 13 R. (H. L.) 69, where the plea of *bona fides* was upheld). Trustees will not be saved from liability for investment of trust funds on insufficient security by having acted honestly and in perfect *bona fides*, if, as a matter of fact, they had failed to make those inquiries which were requisite or proper in the circumstances (*Learoyd*, 1887, L. R. 12 App. Ca. 727). Where the security is property, they may provide for their own safety by *bonâ fide* acting within the terms of sec. 4 of the Trusts (Scotland) Amendment Act, 1891.

Where trustees, acting *in bonâ fide* and in the ordinary course of administration, have paid away all the trust funds, they will not be liable for outstanding debts of whose existence they were not aware (*Stewart's Trs.*, 1871, 9 M. 810). See TRUSTEE.

The powers of factors and agents are determined by the scope of their employment. Where an agent acts *bonâ fide* within the limits so defined, he will not, apart from questions of defective skill, be personally liable in a question with his principal. What he does outside his commission he does at his own peril, and the fact that he was acting, as he honestly believed, in the interests of his principal, will not save him from liability for loss. But he may show that he was compelled to act by some "unexpected and unforeseen emergency," or "to prevent a greater loss, or absolute ruin, to his principal" (Story on *Agency*, 279), and, in so far as he has done so honestly, he will be protected by his *bona fides*. Although an advocate is in a different position to that of an agent for a principal, "what he does

bonâ fide according to his own judgment, will bind his client, and will not expose him to an action for what he has done, even if the client's interests are thereby prejudiced"; and a law agent is "bound to act according to his (counsel's) directions, and will not be answerable to his client for what he does *bonâ fide* in obedience to such directions" (L. P. Inglis in *Batchelor*, 1876, 3 R. 914), although these are not in accordance with his client's instructions; but a *bonâ fide* belief in the hopelessness of a case is no defence to a law agent for throwing it up without communicating with his client (*Urquhart*, 1857, 19 D. 853).

In questions with third parties, the application of the principle of *bona fides* is restricted. Where an agent acts in the *bonâ fide* belief that he has authority to do so, when in fact he has none, he alone will be bound, and will be personally liable for the damage caused. The innocence of the mistake is no excuse (Story, p. 312). Thus *bona fides* will not save a law agent who carries on an action without his client's mandate, from being found personally liable in expenses (*Cowan*, 1836, 14 S. 634; *Robertson*, 1873, 11 M. 910). Mandate is of course recalled by the death of the principal; but if the agent continues to act *bonâ fide* in ignorance of that event, he will not be held personally liable (*Smout*, 1842, 10 M. & W. 1). See AGENCY.

Directors and promoters of companies are, by the Directors Liability Act, 1890, made liable to compensate those who subscribe for shares on the faith of any prospectus or notice issued by the company, and sustain damage through any untrue statement contained therein. A *bonâ fide* belief in the truth of the statement will only exclude liability on the part of the director or promoter provided such belief comes within the limits of sec. 3 of that Act. See JOINT STOCK COMPANY.

BONÂ FIDE TRAVELLER.—The words *bonâ fide* do not occur in the Statutes or form of certificate applying to Scotland as they do in those applying to England and Ireland. See PUBLIC HOUSE STATUTES.

MERCANTILE CONTRACTS GENERALLY.—A transferee may, by virtue of *bona fides*, acquire a title to goods where the transferor had no power to grant one; or he may acquire an unrestricted title where the transferor was only empowered to convey subject to restrictions (Sale of Goods Act, 1893, ss. 25, 47; Factors Act, 1889, ss. 2 (1), 8, 9, 10). A purchaser or pledgee of goods may, by virtue of *bona fides*, acquire a good title where the title in the seller is voidable (Sale of Goods Act, s. 23; Bell, *Com.* i. 261, n.; *Brown*, 1880, 7 R. 427). In this last case *bona fides* is excluded by the knowledge that the seller of the goods is insolvent, but not by knowledge merely that he has not paid the price to a previous purchaser (Brown on *Sale of Goods Act*, 228). See SALE; AGENCY.

Apart from contract, an action is not maintainable for a statement made honestly and in good faith, on the ground that it has been acted upon with the result of causing damage (Addison on *Torts*, xii. 738). Where essential error or misrepresentation enters into a contract, *bona fides* is essential to a claim for restitution, rescission, or damages; and it is no answer in a claim for rescission for the party whose misrepresentation induced the other to contract, to say that he was acting honestly and according to his own belief in making it (*Menzies*, 1893, 20 R. (H. L.) 108). See FRAUD. A peculiar emphasis is laid upon the application of this latter rule to the particular facts involved in contracts of insurance, such contracts being regarded as *uberrimæ fidei*. But no action for reduction of a contract induced by fraud can be maintained if a third party has in good faith and for value acquired rights under it (*Clough*, 1871, L. R.

7 Ex. 26; *Adam*, 1888, 13 App. Ca. 308). Thus the Act of 1621 against fraudulent alienations to conjunct and confident persons, cannot be used to oust a *bonâ fide* onerous acquirer of the goods from the original disponee (*Allan*, 1730, M. 1022). If there has been a breach of contract, *bona fides* can never be pleaded as a defence to its consequences (*Houldsworth*, 1876, 3 R. 304, per L. Gifford).

Where a debtor pays a debt *bonâ fide* to a bankrupt, or a *bonâ fide* purchaser of moveables receives the goods from a bankrupt, in ignorance of the sequestration, the transaction is valid and effectual. Where the holder of a bill, promissory note, or security *bonâ fide*, in ignorance of the sequestration, gives it up to the bankrupt in return for payment of his debt, he will not be allowed to suffer loss or damage through such parting with his adminicle of debt (Bankruptcy Act, 1856, s. 111; *Harkness*, 1836, 14 S. 1015).

Bonæ fidei, actiones.—In Roman law the effect of some contracts was to produce liability which was precisely determined and accurately defined; the effect of others was to produce liability which was neither precisely determined nor accurately defined. Contracts of the former kind were *negotia stricti juris*, and were enforced by *actiones stricti juris*; contracts of the latter kind were *negotia bonæ fidei*, and were enforced by *actiones bonæ fidei*.

In the earlier law, all the obligations recognised by law were created by definite and precise words, and were literally interpreted. With the rise of commerce, importance became attached more to the spirit than to the letter of the engagement, more to the intention of the parties than to the form of their agreement. Accordingly, under the formulary system (see ACTIO) it became common, especially in actions which owed their origin to the *jus honorarium*, to vest the judge with full discretion to determine what was fair and equitable in the circumstances of the particular case. Such actions were known as *bonæ fidei actiones*, the name being derived from the words *ex bona fide*, which, in actions of this sort, were added in the *intentio* of the *formula* delivered to the *judex*. The effect of the addition of these words was immense. The judge was thereby given power to go behind the strict letter of the agreement and discover the real intention of the parties. Thus he could take cognisance of *pacta adjecta*, informal subsidiary understandings between the parties (*Dig.* 2. 14. 7. 5); or hold local and trade usages to be implied terms in a contract (*Dig.* 21. 1. 31. 20). In *bonæ fidei* actions the *formula* always contained a *demonstratio* (see ACTIO) setting forth the circumstances in which the action was brought, and further, the *intentio* was always uncertain (*incerta*), the nature of the defender's liability being expressed in the words, *quidquid dare facere oportet ex bonâ fide*. It was therefore the duty of the judge, though not expressed in the *formula*, to take account of any counter-claims of the defender, and to give full effect to all equitable considerations. Thus what was due to the pursuer might be compensated by a debt due by the pursuer to the defender, the judgment being only for the balance (Gaius, iv. 64 *et seq.*). All the great commercial actions of the later Empire were *bonæ fidei*, such as sale, hire, partnership, deposit, etc. (For an enumeration of the *bonæ fidei actiones*, *vide* Gaius, iv. 62; Just. *Inst.* iv. 6. 28). Justinian in some degree broke down the distinction between *actiones stricti juris* and *actiones bonæ fidei* (Just., *Inst.* iv. 6. 29, 30). See Stair, iv. 3. 41. STRICTI JURIS, ACTIONES.

Bona vacantia.—*Roman Law.*—The property of a deceased person, who had not disposed of his estate by will and who left no *heres ab intestato*, either civil or prætorian, was, in Roman law, *bona vacantia* (*Dig.* 49. 14. 1. 2; 44. 3. 10. 1). Such property was open to *occupatio*, and it does not appear that the State originally claimed it. Under the Lex Julia caducaria, however, the claim of the Treasury to *bona vacantia* was established (Gaius, ii. 150; Ulpian, xxviii. 7). The State—that is, in the early period, the *ærarium*, and afterwards, the *fiscus*—acquired such property *per universitatem*, but did not take as heir. It entered on the *bona vacantia*, however, *loco heredis*, and as such was responsible to creditors of the deceased, as well as for *fideicommissa* charged on his estate (*Dig.* 30. 96. 1). Certain classes of persons had the privilege of claiming *bona vacantia* before the fisc, *e.g.* a legion had such a preferential claim over the estates of soldiers belonging to it, and various corporate bodies had a like preference in respect to property left by members of the corporation, who died without *heredes* (*Cod.* x. 10).

Scots Law.—The Crown, as *ultimus hæres*, takes the property, both heritable and moveable, of any subject dying intestate on the failure of heirs connected by blood with the defunct (Ersk. *Inst.* iii. 10; *Finnie*, 1836, 15 S. 165). The most common case is that of bastards, since a bastard in the eye of the law can have no heirs except his own children (Stair, iv. 12. 1; Ersk. *Inst.* iii. 10. 8). Where the property so devolving upon the Crown consists of heritage which is held of a subject superior, it is necessary to interpose a donatory, as the sovereign cannot hold of a subject. The Crown, or donatory, must pay the debts of the deceased, so far as the value of his estate goes; but their liability for debts is limited to the amount of the estate (Ersk. iii. 10. 4). The right of the Crown to *bona vacantia* is rather a caduciary right than a right of succession; and the Crown cannot succeed as conditional institute under a destination to "heirs" (*Torrie*, 1832, 10 S. 597). Savigny's view is that the right to *bona vacantia* is to be regarded as supplementary to the law of succession, and belongs to the fisc of the defunct's last domicile (Savigny, *Droit Romain*, tom 8, p. 311). Lord M'Laren supports this view, subject to the necessary correction for the case of immoveable property (M'Laren on *Wills and Succession*, 3rd ed., vol. i. p. 22).—[See Stair, iii. 3. 43; iv. 12. 2.] See Ultimus Hæres.

Bond is the name used to describe the deed (or clause or clauses in a deed) by which an obligation is undertaken. The obligation may be of any kind, as to pay, or to do, or to abstain from doing. These distinctions may seem sufficiently clear and obvious; but in point of fact and law it is sometimes a difficult question, and one attended with very important consequences, to determine whether the true legal nature of the obligation is to pay or to perform (p. 175. *infra*). The circumstances under which an obligation may be granted for payment of money are various. A few of the most outstanding cases are: obligations for repayment of borrowed money, which may be the obligant's own debt, or truly the debt of a third party; for indemnity by such third party—the true debtor—to the person so interposing his credit; for payment of family provisions, and for payment of annual or other periodical sums for a life or lives or other term. These obligations are respectively embodied in ordinary personal bonds, bonds of caution, bonds of relief, bonds of provision, and bonds of annuity. See Cautionary Obligations; Relief; Provisions; Annuities.

The form of an ordinary unsecured personal bond for borrowed money runs thus:—

I, *A. B.*, grant me to have instantly borrowed and received from *C. D.* the sum of £ , which sum I bind myself, and my heirs, executors, and representatives whomsoever, all jointly and severally, without the necessity of discussing them in their order, to repay to the said *C. D.* or his executors or assignees at the term of [ ] within the [*place*], with a fifth part more of liquidate penalty in case of failure, and the interest of the said principal sum at the rate of per centum per annum from the date hereof to the said term of payment, and half-yearly, termly, and proportionally thereafter during the non-payment of the said principal sum, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said interest at the term of next for the interest due preceding that date, and the next term's payment thereof at following; and so forth, half-yearly, termly, and proportionally thereafter, during the non-payment of the said principal sum, with a fifth part more of the interest due at each term of liquidate penalty in case of failure in the punctual payment thereof [*obligation for expenses, if desired* (see *infra*)]: And I consent to registration hereof for preservation and execution. —In witness whereof.

With reference to this form there are, of course, many practical details which need to be attended to, and which may necessitate alterations in particular cases. Thus the money may have been advanced some time before, or the bond may be not for borrowed money in the ordinary sense, but for money due on an accounting, or it may be intended that the money should not be payable till after a period of years; in each case the necessary alterations on the style will be briefly made, so as to have a correct statement of the facts and of the contract. In fixing the place of payment, it is to be remembered that it regulates the liability of the parties for bank remitting charges.

The legal questions arising on, or in connection with, the usual personal bond include the following: How compound interest may be obtained; what is covered by the penalty clause; the rights of both parties in the matter of compelling the making or acceptance of repayment: the transmission of the debt in the succession of the creditor; and its incidence in the succession of the debtor.

Interest (*q.v.*).—It has been laid down (Ersk. iii. 3. 81; Bell, *Conrey.* 256) that there can be no valid obligation for compound interest. The Act founded on by Erskine (1621, c. 28) is repealed, and it is difficult to see any ground for the dictum. It is admitted that such accumulation may be expressly agreed to by the creditor under a bond of corroboration as regards arrears existing at that date (Bell, *supra*); the Act 1 & 2 Vict. c. 114 (ss. 5 and 10) provides machinery for reaching the same result from time to time without the debtor's consent; and see the express terms of the judgment of the Court in *Molleson* (1892, 19 R. 581).

Penalty.—The penalty covers only actual expense, loss, and damage incurred by the creditor through the debtor's default. As to expenses which are included, see the cases of *Gordon*, 1761, Mor. 10050, and *Young*, 1796, Mor. 10053. It will observed that even if liability for such expenses as are covered by the penalty clause could be established otherwise, as by a separate action, still the presence of the clause in the bond has the advantage of giving the creditor the benefit of any security constituted by the bond for such expenses, as well as for principal and interest. The usual form of personal bond includes no obligation for expenses. This appears to be an omission: and if wished, an express clause can be adapted from the clause in form of bond and assignation in security on p. 172, *infra*.

Repayment.—In the absence of any agreement to the contrary, the debtor under a personal bond is entitled to repay the loan at any time after the

term of payment without notice; and in like manner the creditor can call it up at any time after the term of payment, giving the usual charge for payment, or proceeding by action if the bond should contain no consent to registration for execution. When a fixed endurance has been agreed to on both sides, the debtor cannot insist on making repayment, against the will of the creditor, otherwise than in terms of the agreement, any more than the creditor can in such a case force payment before the agreed-on term (*Ashburton*, 1892, 20 R. 187).

Creditor's Succession.—Originally all bonds with a clause of interest were heritable after the first term of payment of interest *or* if the term of payment of principal was distant or uncertain with interest running in the meantime. The test is the *interest*. Thus a bond without a clause of interest was always moveable (Ersk. ii. 2. 9). And no matter whether the first term of payment of interest was earlier or later than, or simultaneous with, the term of payment of principal, the bond remained moveable until the first term of payment of interest had arrived (*Barclays*, 1682, Mor. 5777; *Gray*, 1859, 21 D. 709; *Downie*, 1866, 4 M. 1067). Again, while a bond with a distant or uncertain term of payment of principal was heritable from the first if it bore interest (*Gray*, 1666, Mor. 3629), on the other hand such a bond remained moveable if it bore no interest until the distant or uncertain date. *Gray's* (1859, *supra*) case was an instance of a bond of this kind. It was payable on the death of a third party, until whose death it bore no interest; and accordingly it was found to be moveable.

This state of the law resulted practically in sending all personal bonds to the heir along with the landed estates or other heritable property in intestate successions. The law was altered in 1641 (c. 57) and 1661 (c. 32). These Statutes do not touch bonds with heritable security or bonds excluding executors. The 1661 Act provides that other bonds, granted after 16th Nov. 1641, are to be moveable except as regards (1) the fisk, and (2) the rights of husband and wife. The clause as to the fisk prevents such bonds falling to the Exchequer under single escheat (*q.v.*). The second exception excludes such bonds from (1) the *jus mariti*, (2) the *jus relictæ*, and (3) the *jus relicti*. It is to be understood, however, that the Act of 1661 does not exclude those conjugal rights further than they were excluded before 1641; the Act merely prevents such rights extending further than previously. Thus, as before 1641, so after that date and down to the present time, the *jus relictæ* (and now the *jus relicti*) include personal bonds where the first term of payment of interest has not arrived at the death of the spouse whose succession is in question, *unless* the term of payment of principal be distant or uncertain, and even then, if no interest runs till such term. And as regards the *jus mariti*, down to the Married Women's Property Act, 1881, it included personal bonds where the first term of payment of interest had not arrived at the date of the marriage, or at the date of the acquisition of the bond by the wife after marriage, with the same exception and sub-exception as just stated with reference to distant or uncertain terms. And even yet in those marriages contracted before the Act of 1881, in which the *jus mariti* remains in force as regards subsequent acquisitions, it includes personal bonds acquired by the wife before the first term of payment of interest, but again under the same exception and sub-exception.

It is not uncommon to find special Acts of Parliament declaring certain bonds to be "moveable or personal estate," without repeating the exception found in the 1661 Act applicable to the rights of husband and

wife. The question then arises whether the non-repetition of this exception results in its repeal as regards the bonds to which such special Acts apply.

Bonds excluding executors are in a peculiar position. The Act of 1661 declares that they are "to be heritable and to pertain to the heir." It has been doubted whether this makes them heritable as regards the rights of husband and wife, but it is difficult to see how any other conclusion could be reached. Such bonds continue heritable in the person of the heir of the original creditor (*Mackay*, 1725, Mor. 3224). But it is another question whether, if such a bond is assigned without repeating the exclusion of executors, it thereby becomes personal in the new creditor, or remains heritable. If it were assigned to the new creditor "and his *executors*," it would manifestly be rendered personal; and the same would result if the new destination were to him "and his heirs and executors" (*Sandilands*, 1680, Mor. 5498). But if it were assigned to the new creditor simply, or to him "and his heirs," there would be room for question (*Kennedy*, 1747, Mor. 5499: Ersk. ii. 2. 12). It will be observed, however, that the exclusion of executors is applicable only to the executors of the original creditor, and it would seem to follow that in the succession of the new creditor there is no exclusion of executors, and therefore that the bond is personal. That is the rule recognised in the case of heritable securities (Consolidation Act, s. 117). See *Ross*, 4 July 1809, F. C. Personal bonds excluding executors are practically unknown.

Without an express exclusion of executors, a bond may be made heritable *destinatione*, as by taking it to the creditor and his heir in heritage, or his heir of line or nearest heir-male. But a destination to heirs of the body has not that effect (*Duff*, 1745, Mor. 5429). That follows from the consideration that a destination to "heirs" leaves the bond personal, and the addition of the words "of the body" merely limits the selection within the same class, *i.e.* personal representatives. It is very common to find the obligation running in favour of "heirs, executors, and assignees"; but "executors and assignees" is both shorter and more correct.

Even where bonds are heritable altogether or to certain effects, the interest to date of death or other event in question is moveable (1661, c. 32).

Debtor's Succession.—Even though the bond do not contain a renunciation of the benefit of discussion, the creditor has right of action against the successors in both the personal and heritable estates, and he can proceed against the latter in the first instance: but whether he do so first or not, he must observe a certain order, *i.e.* in attacking the successors in the heritable estate. The order is: (1) the heir specially bound or taking the property relative to which the obligation is granted, (2) heir of line, (3) formerly heir of conquest, (4) heirs-male, (5) other heirs of provision, and of these apparently the heir of a marriage is liable last (Bell, *Convey*, 247, and authorities cited; Bell, *Prin.* s. 1935; M'Laren, *Wills*, 1320). The difference resulting from a renunciation of the benefit of division is, that not only may the creditor attack the heritable successors before he sues the personal representatives (as he always may), but he may take the former in any order he chooses. The opinion has been expressed that an obligation on "heirs and executors jointly and severally," imports an exclusion of the right of discussion (per L. Watson in *Burns*, 1887, 14 R. (H. L.) 20). It would not be prudent to rely upon this, and there is no occasion to do so.

Although a bond may be heritable in the creditor's succession (see

above), it does not follow that it is heritable in the debtor's succession also. Thus there is no authority for holding that a bond excluding executors is heritable in the debtor's succession. The distinction is obvious, for the creditor has power and control over the destination, and the debtor has not. The converse case of heritable securities is in point; these are moveable in the creditor's succession, but heritable in that of the debtor. But, as regards *jus relictæ*, bonds which, if due to the deceased, would not increase the widow's share, are not to be reckoned against her if due by the estate (*Ross*, 14 Nov. 1816, F. C.; Fraser, 980).

As to questions between creditors under bonds on the one hand, and legatees and other beneficial successors on the other, and the duties and liabilities of the debtor's trustees in that connection, see *Forbes*, 1893, 31 S. L. R. 225, and cases cited; and *Miller*, 1893, 20 R. 675.

Variations in the form and effect of bonds arise from the parties by and to whom they are granted. Amongst others the following may be referred to, namely, bonds by (1) two or more persons, (2) principal and cautioner, or (3) trustees or others in a fiduciary capacity; and bonds to (1) trustees, etc., or (2) two persons in liferent and fee.

Two or more Obligants.—The principal points are whether they are to be liable *in solidum* or only *pro rata*, and the risk which the creditor runs from giving time, parting with securities, etc. If it be intended that they should be liable *in solidum*, the proper expression is "jointly and severally"; but the same result follows from the word "severally," or "all as full debtors," or if it is a case of partnership, or if the obligation be *ad factum præstandum*; the effect of "conjunctly" is doubtful (Bell, *Prin.* ss. 54–61, and cases cited). Principal and cautioner are also jointly and severally liable (*Grant*, 1721, Mor. 14633; Bell, *Prin.* s. 245). For other specialties in bonds of caution, see CAUTIONARY OBLIGATIONS.

The Bankruptcy Act, 1856 (s. 56), provides that when one of the obligants is bankrupt, the creditor does not release a co-obligant by drawing a dividend from the estate of the bankrupt, and consenting to a discharge or to any composition. This, however, does not meet the case of private arrangements, and it is common to insert special clauses dealing with these and similar matters, as well as with the case of any of the obligants not signing, or of some of the signatures not being genuine. The following clauses, though somewhat lengthy, are exhaustive:—

And we do each hereby agree and declare as follows, namely: (*First*) That the obligations undertaken by us respectively shall be effectual against us respectively and our foresaids, notwithstanding the non-existence of the other [*others*], or any defect or nullity in, or any failure or extinction of, the obligations undertaken or intended to be undertaken by the other [*others*], or in or of any of the securities constituted or intended to be constituted, and that the securities constituted by us respectively shall remain in full force notwithstanding such non-existence as aforesaid, or any defect or nullity in, or any failure or extinction of, the obligations undertaken or intended to be undertaken, or in or of any of the other securities, the said *X.* [*creditor*] being nowise responsible for the validity, sufficiency, or continuance of any of the obligations or securities; (*second*) that in any case these presents shall be in all respects binding and effectual as regards any one or more who do subscribe, even though one or more should not subscribe, or though any of the other signatures should not be genuine or should be null or reducible, or should otherwise be or become ineffectual; and (*third*) that we are both [*all*] principal debtors to the said *X.*, and, further, that he and his foresaids shall be entitled to treat each one of us as if such one were solely and alone liable, and as if the security constituted by such one were the only security; and particularly, but without prejudice to the said generality, the said *X.* and his foresaids shall be entitled not only to all the rights and powers competent to creditors at common law and under Statute, but also to the following rights and powers, all to be exercised or not in their sole discretion without the consent of us or either [*any*] of us or our representatives,

namely: (*a*) To accept a dividend under any private arrangement with reference to the affairs of either [*any*] of us, and thereupon to discharge the obligant from whose estate or on whose behalf such dividend is paid; (*b*) to give time; (*c*) to part with securities with or without consideration; and (*d*) to discharge any obligations or securities with or without consideration—all without prejudice to the continuing full liability of us and our foresaids so far as not expressly discharged, and also without prejudice to the securities held by the said *X.* and his foresaids so far as not expressly renounced.

Bonds by Trustees.—The important points are the trustees' power to borrow, and whether they are or are not to be personally liable. If personal liability be not intended, the bond ought to be anxiously framed so that the granters bind themselves "only as trustees foresaid, and not personally or individually," and the consent to registration ought to be for execution against the granters in the same qualified terms (M'Laren, *Wills*, 1334, 1339). But in any case the trustees will be liable if they part with the trust estate without making proper provision for the debt (*Thomson*, 1829, 7 S. 787; *Miller*, 1893, 20 R. 675). All the trustees ought to sign the bond (*Scott*, 1822, 1 S. (332) 308).

Bonds to Trustees.—The obligation ought to run in favour of the named trustees "and the survivors and survivor of them." A clause is sometimes inserted to the effect that neither the debtor nor any assignee is to be concerned with the application of any money which he may pay to the trustees. But even without such a clause there is no authority for charging the debtor or any assignee with any duty to see to the application of the money by the trustees; and if such a duty did exist, it is difficult to see how such a clause could afford protection.

Bonds to liferenter and fiar are very inconvenient. Both liferenter and fiar must concur in assigning or discharging. A trust is more appropriate.

Assignations of Bonds.—The rule of the common law (still recognised in many contracts; see ASSIGNATION) was that neither party could substitute another in his place, and therefore it was held incompetent for a creditor to assign his bond to a new lender without the debtor's consent. This difficulty was overcome by the creditor giving the new lender an irrevocable mandate to recover principal and interest. The next stage was a direct assignation, supplemented by a clause of mandate. Finally, the Transmission of Moveables Act, 1862, left the direct assignation without the mandate. The Act introduced two new forms, the one to be written separately, and the other to be annexed to the bond. In the statutory forms the destination is to the assignee "and his heirs or assignees," but it is better to substitute "executors." If the granter is not the original creditor, his title will be briefly deduced; and if the assignation is partial only, the exact extent must be stated.

The statutory forms of assignation contain no clause of warrandice, which, however, is a matter of great importance in such assignations. If the assignation is gratuitous, there is implied simple warrandice, *i.e.* against *future* acts and deeds. The warrandice implied in a sale of a debt is from fact and deed, and, further (the transaction being onerous), there is implied warrandice that the debt exists and is due to the assigner, *i.e. debitum subesse* (*Sinclair*, 1829, 7 S. 401). This is the rule even though the price fall short of the debt, and in that case the warrandice extends to the full debt, and is not limited to the price (*Houstoun*, 1717, Mor. 16619). Even express warrandice from fact and deed does not exclude the implied warrandice *debitum subesse*. "The warrandice expressed left the warrandice implied from the nature of the transaction untouched" (*Ferrier*, 1828, 6 S. 818). But there is no implied warrandice of the solvency of the debtor, nor has

absolute warrandice that effect (*Barclay*, 1671, Mor. 16591). Cf. Bell, *Prin.* s. 1469.

The assignee of a personal bond is exposed to all exceptions pleadable against the assigner. Thus the debt may have been wholly or partly repaid, or there may be compensating claims. The new lender is not in safety to take an assignation without first making inquiry of the debtor whether the whole debt still remains due and unaffected in any way.

Discharge.—This may take the form of a deed, thus:—

I, *A. B.*, in consideration of the sum of £ , instantly paid to me by *C. D.*, do hereby discharge a bond, dated , granted by the said *C. D.* in my favour for £ , and all interest due thereon.—In witness whereof.

But a receipt on the bond is sufficient.

Bond and Assignation in Security.—This is the form of deed used when security for the debt is constituted over personal property, such as life policies, legacies, shares of trust estates, etc.; also over leases, recorded or unrecorded (see LEASE): also sub-securities over heritable securities, which are not uncommon. Confining attention to the first of these classes, it is to be observed that there are as yet no statutory facilities for such securities. The consequence is that either unduly wide powers must be given to the creditor, enabling him to deal with the security as if it were his own property, as in the form in the *Juridical Styles* (ii. 351), or the deed is greatly lengthened by the insertion of clauses giving powers of sale and other powers, and regulating their exercise; and in the case of securities over life policies, there must also be obligations for keeping them in force and renewing them, which might also be regulated by short statutory clauses. The following is a very full form of a bond secured over a life policy:—

I, *A. B.* [*repeat receipt clause and obligation for principal, interest, and penalties, as in form of unsecured personal bond on p.* 167, *supra*): And in security of the obligations hereinbefore and hereinafter undertaken, I assign to the said *C. D.* and his executors and assignees whomsoever, but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, the policy of assurance granted by the *N.* Assurance Company in my favour on my own life for the sum of £ , numbered and dated , on which there is a premium of £ , payable on the day of in each year: Together with the said sum contained in the said policy of assurance, and all bonus additions which have accrued and which may accrue thereon, and my whole right, title, and interest, present and future, in or to the said policy of assurance, and in or to any claims, bonuses, advantages, or benefits which have arisen or which may arise thereby in any manner of way: With full power to the said *C. D.* and his foresaids in their sole discretion, without the consent of me or my foresaids, and before as well as after default, to do everything in relation to the said policy of assurance, and any policy or policies which may be substituted therefor, or for recovery of the sums therein contained and proceeds thereof, which I could have done before granting these presents or which I or my foresaids may come to have right to do, and particularly, but without prejudice to the said generality, with power to the said *C. D.* and his foresaids to recover the sums contained in the said original and substituted policies of assurance and proceeds thereof, and to give valid and effectual discharges therefor: And also with power from time to time to exercise all options which are or may become available under the said original and substituted policies of assurance, and to carry out the same and to recover all sums payable in respect thereof, and to give valid and effectual discharges therefor: And also with power from time to time to make total or partial surrenders of bonus additions accrued or to accrue, or both, and that in exchange for cash payments which the said *C. D.* and his foresaids shall have power to receive and discharge, or in payment of premiums, or towards reduction of premiums, permanent or temporary, or in extinction of premiums, or otherwise; and generally with power from time to time to arrange for and carry out such changes as they may think proper in the terms of the said original and substituted policies of assurance, and in the amount payable thereunder, and in the nature and conditions of the assurance itself, and in the amount of premiums payable therefor: And I bind myself and my foresaids, all jointly and severally as foresaid, to fulfil all the con-

ditions necessary for the upkeep of the said original and substituted policies of assurance, and to keep the said original and substituted policies of assurance in force; and for that purpose, *inter alia*, to make payment to the respective assurance offices in each year of the premiums and extra or increased premiums which may become payable in respect thereof, and that so long as the sums due or to become due under these presents or any part thereof shall remain unpaid, and to exhibit discharges thereof to the said *C. D.* and his foresaids 14 days at least before the last day of grace for payment of each such premium; and in case the said original or substituted policies of assurance, or any of them, shall from any cause become void or expire, then I bind myself and my foresaids, all jointly and severally as aforesaid, to renew the same, and to pay all fines and make all other payments necessary for that purpose, or to effect, in name of the said *C. D.* or his foresaids, and deliver to them, a new policy or new policies of assurance upon my life in place thereof with an assurance company approved of by the said *C. D.* or his foresaids, and that for such sum or sums, payable in such event and on such terms and conditions, as may be required by the said *C. D.* or his foresaids: And should the said *C. D.* or his foresaids at any time advance the premiums or extra or increased premiums necessary for the upkeep of the said original and substituted policies of assurance or any of them, or be at the cost of renewing any of the said original or substituted policies, or paying fines or making other payments necessary for these purposes, or of effecting a new policy or new policies on my life, all of which they are hereby in their sole discretion empowered, but shall not be bound to do, I hereby bind myself and my foresaids, all jointly and severally as aforesaid, to repay on demand all sums so disbursed, with a fifth part more of liquidate penalty in case of failure in punctual repayment, and with interest thereon respectively at the rate of per centum per annum from the date of advance till repayment: Declaring, as I hereby agree, that the amount due at any time shall be sufficiently and conclusively ascertained and constituted by a certificate under the hand of the said *C. D.* or his foresaids or their agent; and that no suspension of a charge or threatened charge for payment of any sum so ascertained shall be applied for or pass except on consignation only: And it is hereby provided and declared that in the event of failure in payment of the principal sum, interest, advances hereby authorised, and interest thereon, all as before provided, and expenses as after mentioned, or any of them or any part thereof, within [*state period*], after a written demand of payment addressed to me or any of my foresaids at my present or at my or their last known address by or on behalf of the said *C. D.* or his foresaids, and posted in ordinary course (a certificate signed by the said *C. D.* or any of his foresaids or their agent being sufficient evidence of such demand and postage, and the validity of such demand and of any sale following thereon being nowise affected by the pupillarity, minority, or legal incapacity of the person to whom such demand may be addressed), then and in that case it shall be lawful to and in the power and option of the said *C. D.* and his foresaids, at any time after the expiration of the said period of , and without any other intimation or procedure, to sell the said original and substituted policies of assurance in whole or in lots, and that either by public roup or private bargain, and with or without advertisement, and I hereby grant power of sale accordingly, declaring that the foresaid power of sale may be exercised by way of surrender to the respective assurance companies: And I warrant the said policy of assurance and conveyance thereof absolutely: And I reserve power of redemption at any term of Whitsunday or Martinmas after the said term of payment, on three months' notice in writing, and that by payment or consignation in the said Bank in of the said principal sum, penalties if incurred, interest, advances, interest thereon, and expenses: And I bind myself and my foresaids, all jointly and severally as aforesaid, for the expenses which may be incurred by the said *C. D.* and his foresaids in enforcing or endeavouring to enforce the obligations hereby undertaken, or in exercise of the powers hereby conferred, or otherwise in consequence hereof or in relation hereto, or to the premises in any manner of way, and for the expenses of assigning and discharging this security: And I consent to registration hereof for preservation and execution.—In witness whereof.

The bond will be followed by intimation to the insurance company, and it is necessary to ascertain beforehand that the company have no claim against the policy, and what notices they have received affecting it. The insured's age should also be admitted by the company. Any assignation of the bond, and the discharge of it, will in like manner be intimated to the company, and assignations will also be intimated to the debtor under the bond. No assignation should ever be taken without first making inquiries both of the debtor and of the company (see INSURANCE).

The following are forms of assignation and discharge of such a bond and assignation in security:—

ASSIGNATION.

I, *C. D.*, in consideration of the sum of £ instantly paid to me by *E. F.*, do hereby assign to the said *E. F.* and his executors and assignees the bond and assignation in security, dated , granted by *A. B.* in my favour for the sum of £ , with interest from , and all the other obligations therein contained; and also (in security as therein expressed) the policy of assurance [*describe it as in bond*].—In witness whereof.

DISCHARGE.

I, *C. D.*, in consideration of the sum of £ paid to me by *A. B.*, do hereby discharge the bond and assignation in security, dated , granted by the said *A. B.* in my favour, and all interest due thereon, and all obligations therein contained: And I re-assign to the said *A. B.*, and his executors and assignees, the policy of assurance [*describe it as in bond*]; and I warrant the foregoing discharge at all hands, and the foregoing retrocession from my own facts and deeds only.—In witness whereof.

[Ersk. ii. 2. 9: Menzies, 186; Bell, *Convey*, 244; Fraser, 717; *Juridical Styles*, ii. 308, 349.]

Bond and Disposition in Security.—This is the usual form in which securities for money are created over heritable property. The form is statutory, and the effect of the different clauses is declared by Statute (1868 Act, Schedule FF., and s. 119). The personal obligation for principal, interest, and penalties is the same as in a personal bond (see BOND), and then the statutory form proceeds thus:—

And in security of the personal obligation before written, I dispone to and in favour of the said *C. D.* and his foresaids, heritably but redeemably as after mentioned, yet irredeemably in the event of a sale by virtue hereof, All and Whole [*description or statutory reference*], but always with and under the burdens [*refer to these if necessary*]: And that in real security to *C. D.* and his foresaids of the whole sums of money above written, principal, interest, and penalties: And I assign the rents: And I assign the writs: And I grant warrandice: And I reserve power of redemption: And I oblige myself for the expenses of assigning and discharging this security: And, on default in payment, I grant power of sale: And I consent to registration for preservation and execution.—In witness whereof.

The clauses are thus: (1) Receipt and obligation, (2) disposition, (3) assignations of rents and (4) writs, (5) warrandice, (6) redemption, (7) obligation for expenses, (8) power of sale, (9) registration, (10) testing clause. Observations are necessary on those clauses, except the 9th and 10th.

1. *Receipt and Obligation.*—There can be no heritable security for money unless it is (1) definite in name of creditor, (2) definite in amount, and (3) advanced at or prior to the delivery of, or infeftment on, the bond, whichever may be later in date. The Act 1696, c. 5, annuls securities for debts "to be contracted for the future," so far as regards any debt "contracted after the infeftment" (see authorities in Ross, L. C. L. R. 632, *et seq.*). But where the creditor had insisted on having the deed recorded *before* he advanced the loan, and it was established that the bond was not delivered, nor the loan paid over, until after infeftment, it was held that the Act did not apply. Nor will the Act apply where there is an absolute obligation on the part of the lender to make the advance. But the mere fact that, instead of an indefinite obligation for future advances, the bond is written for a specified sum, will not protect the security as regards future advances. In this connection the rule of law applicable to debit and credit entries in an account current must be kept in view. The Act applies to

securities over redeemable as well as over irredeemable rights. For these propositions, see Ross, *cit.* An exception is made by Statute to meet the case of cash-credits and obligations of relief to cautioners (54 Geo. III. c. 137; 19 & 20 Vict. c. 91, s. 7), but the security is limited to a definite sum, which must be specified in the bond, and three years' interest at 5 per cent. Another way of getting over the same difficulty is by an ABSOLUTE DISPOSITION (*q.v.*), with or without a back-bond. The common-law rule, requiring the specification of a definite sum, does not prevent the constitution of securities for obligations *ad factum prœstandum*. Accordingly, it sometimes becomes of great importance to determine whether a particular obligation is to be regarded as one for payment or *ad f. p.* In *Edmonstone*, 1888, 16 R. 1, the obligation was to purchase and transfer to the creditor a certain amount of Government Stock. This was an obligation which could be implemented only by payment of money, and that of an indefinite amount; but it was held to be an obligation *ad f. p.*, and therefore well secured.

2. *Disposition in Security* (see DISPOSITION).—In principle there is no difference between descriptions in permanent titles and in securities; and the Conveyancing Statutes neither recognise nor suggest any variation in practice. It is always desirable in securities over buildings to convey the fittings, etc. The clause may run—

> Together with all grates, blinds, gas-fittings, and other fittings and fixtures which now are or which may hereafter be in or upon the subjects, so far as the same do or may belong to me or my foresaids.

Such a clause may in certain events materially improve the creditor's position.

3. *Assignation of Rents.*—This clause is declared (s. 119) to import—

> . . . An assignation to the creditor and his representatives *in mobilibus* or his heirs, as the case may be, and to his assignees, to the rents to become due or payable from and after the date from which interest on the sum in the security commences to run . . . . including therein a power to the creditor and his foresaids to insure all buildings against loss by fire; and on default in payment, to enter into possession of the lands disponed in security, and uplift the rents thereof, or to uplift the rents thereof if the lands are not disponed in security, and to make all necessary repairs on the buildings, subject to accounting to the debtor for any balance of rents actually recovered beyond what is necessary for payment to such creditor and his foresaids of the sums, principal interest and penalty, due to him or them under such security, and of all expenses incurred by him or them in reference to such possession, including the expenses of management, insurance, and repairs. . . .

If the security embraces superiority-rights, the clause will run—

> And I assign the rents, feu-duties, and casualties of superiority, and sums in lieu thereof and arrears thereof.

The assignation of rents is completed by recording the bond without the necessity of intimation to the tenants, and is, without such intimation, preferable (as regards the rents included in the assignation in the bond, and excepting arrears) to a mere assignation or arrestment, even though intimated or used before the infeftment on the bond (Bell, *Convey.* 641). If it were otherwise, no one could lend on land on the faith of the records; he would also need to make inquiries of all the tenants as to assignations or arrestments. But the tenants are entitled to pay to the proprietor until they are interpelled by the bondholder. To prevent such payment, all that is required is actual notification by the creditor to the tenants: but to

give the creditor, in turn, an active title to uplift the rents, the procedure is by action of MAILLS AND DUTIES (*q.v.*).

Wherever buildings are a material part of the security, they (and also the rents thereof) ought from the first to be insured against fire in the name of the lender *primo loco* and the borrower in reversion. The Act authorises fire insurance by the lender before entering into possession, but it does not appear to create security for the premiums until possession is taken; and in any case, there may be differences as to amount of insurance if not specially arranged. Accordingly, it is usual to insert a special clause *before* the disposition in security. It may run thus—

> And in respect the said *C. D.* and his foresaids may, if they think fit, effect and maintain (but without any liability on their part to effect, or, if effected, to maintain) an insurance against loss by fire over the buildings erected on the subjects after disponed, to the extent of £ on buildings, and £ on rents, I bind myself and my foresaids to repay to the said *C. D.* and his foresaids, at the term of Whitsunday yearly, the sum of £ , or such other sum, more or less, as may be the amount of the annual premium disbursed by them for the upkeep of such insurance, with interest at the rate of 5 per cent. per annum on each premium from the date of disbursement till repaid.

It will be observed that the Act does not authorise glass insurance. That is now very common, and may, if wished, be specially sanctioned in the bond.

The Heritable Securities Act, 1894 (57 & 58 Vict. c. 44), authorises (s. 6 and 7) a creditor in possession to grant leases not exceeding 7 years; and he may apply to the Sheriff for power to lease for longer periods, up to 31 years for minerals and 21 years in other cases.

Until 1894, if the proprietor was in personal possession he could not be removed summarily, but only by an action of declarator in the Court of Session (*Horne*, 1881, 8 R. 737); and he cannot be made to pay rent for his own property (*Smith*, 1890, 17 R. 1088). Now, under the 1894 Act (s 5), if interest is due and unpaid, or if the principal is unpaid after formal requisition, the proprietor in such a case is deemed to be in possession without a title, and may be summarily ejected.

The Act does not lay down the lines on which the accounting between the creditor who has been in possession and the debtor or postponed creditor is to proceed. In what instalments is the creditor bound to impute any "balance of rents" to the principal of his debt? Authority is wanting; but the Act is very careful to protect the creditor against the debtor redeeming the security without ample and convenient notice (see *Redemption* below), and it would be only equitable and consistent that the creditor should not be bound to apply rents to principal except in reasonable amounts (what is reasonable being, as usual, a question of circumstances), all sums unapplied being of course kept in bank at interest.

4. *Assignation of Writs.*—This clause is (s. 119) declared to import—

> An assignation to the creditor and his foresaids to writs and evidents to the same effect as in the fuller form generally in use in a bond and disposition in security with power of sale prior to 30th September 1847.

An important practical matter arising on this clause is: Who is to have the custody of the title-deeds? If the creditor wishes the custody, he must specially stipulate for it. It is usual to do so in the case of securities over house properties; in the case of landed securities, the reverse is the rule. But in any case there ought to be a discharge of lien. One way is to deliver the writs to the lender, and to receive them back on borrowing

receipt. If the writs are to be delivered, whether with or without such an arrangement for borrowing them, the clause may run—

> And I assign the writs, and have delivered those in my possession.

5. *Warrandice.*—This clause imports—

> Absolute warrandice as regards the lands and the title-deeds thereof, and warrandice from fact and deed as regards the rents.

If the obligation of warrandice is granted only by the borrower, it adds nothing to the creditor's security. It is, however, a convenient clause in which to specify prior or *pari passu* securities by way of exceptions. But such exceptions will not *create* a prior or *pari passu* ranking in favour of the excepted securities.

6. *Redemption.*—Under sec. 119 of the 1868 Act, and sec. 49 of the 1874 Act, the effect of the clause reserving power of redemption is as follows:—

(1) The creditor is entitled to insist that repayment be (*a*) full, not partial, (*b*) at the term of payment, or a term of Whitsunday or Martinmas thereafter, and (*c*) after three months' notice.

(2) The notice is given by the debtor or his procurator, in presence of a notary public and two witnesses. It is given to the creditor personally or at his dwelling-place, or, if he be furth of Scotland, then edictally.

(3) If the creditor be absent or refuse payment, the debt is consigned in the bank specified in the bond, or, if none specified, then in an incorporated Scots bank having a branch at the place of payment, the redemption being in such branch.

(4) If, from any cause, a discharge cannot be obtained, then, following on such consignation, the debtor obtains a certificate expede by a notary public (1874 Act, Sched. L. 2), which is recorded in the Register of Sasines; and the effect of the consignation and recorded certificate is to disencumber the lands of the security. A postponed bondholder who has sold the property under his own bond is entitled to give notice for redemption of prior securities (*Belford*, 1895, 22 R. 975).

7. *Obligation for Expenses.*—By the 1868 Act (s. 9), this clause is declared to mean—

> That any discharge and renunciation, disposition and assignation, or other deed necessary to be granted by the grantee, upon the grantor making payment and redeeming as aforesaid, and also the recording thereof, should always be at the expense of the grantor.

The clause does not cover the expense of assignations carried through without reference to the debtor; if the expense of assignations is to be thrown on the debtor, an arrangement must be made with him, or the loan must be called up. Again, if the loan is split up without the debtor's consent, it does not appear that he is liable, when he comes to pay off the loan, for more than one set of expenses as for one discharge of the whole debt. If still wider liability is desired, such a clause as that on p. 173, *supra*, may be inserted; but that is quite unknown in ordinary heritable securities.

8. *Power of Sale.*—Under sec. 119 of the 1868 Act; sec. 48 of the 1874 Act; and sec. 16 of the 1894 Act, the effect of the clause is as follows:—

(1) The creditor gives three months' notice to the debtor or his successor. The notice need not (as in the case of redemption) be for a term of Whitsunday or Martinmas. It is to be remembered that this three months' notice is required only as a preliminary to a realisation of

the *security*; the personal liability may be enforced at any time at or after the term of payment, on a six days' charge, even though a requisition with view to sale may have been served and be current (*M'Whirter*, 1887, 14 R. 918; M'Nab, 1889, 16 R. 610).

(2) The notice is by a procurator for the creditor in presence of a notary public and two witnesses. For form, see Sched. FF. 2 of 1868 Act. It is given to the debtor personally, or at his dwelling-place; or if furth of Scotland, then edictally. If the grantor of the bond have sold the property, he or his representatives should get notice, and also the new proprietor: but this does not extend to encumbrancers on *ex facie* absolute titles (*Stewart*, 1882, 10 R. 192). Pupillarity, minority, or legal incapacity does not affect the notice. Sec. 16 of the 1894 Act provides for three special cases, namely: (*a*) Debtor dead, no title completed by heir, and name and address of heir unknown; (*b*) debtor's address, and whether he is still alive, unknown; (*c*) address unknown of person entitled to the notice. In each of these cases the creditor may apply to the Sheriff of the county in which any portion of the security is situated, for warrant for edictal intimation to the debtor in such manner as the Sheriff may prescribe.

(3) Six weeks' advertisement (after the expiry of the three months) in (*a*) newspaper published in Edinburgh or Glasgow, *and* (*b*) a newspaper published in the county in which the security is situated, or if none, then in the next or a neighbouring county. There must be the full period of six weeks between the first advertisement and the sale (*Ferguson*, 1895, 22 R. 643).

(4) Exposure in whole or in lots in Edinburgh or Glasgow, or at the head burgh of the county, or at the nearest parliamentary or police burgh whether within the county or not.

(5) If necessary, adjourned exposure after three weeks' advertisement. If there is a sale, but the purchaser fails to carry it out, and in consequence there is a re-exposure, the original requisition holds, but there must be six, not three, weeks' advertisement (*Howard*, 1890, 17 R. 990). That case is instructive also on the question of what will be considered such delay as to infer abandonment of the requisition. The interval between requisition and sale was six years, and between the sale and last preceding exposure, three years. The sale was held effectual. It was also indicated that the debtor's proper remedy is by interdict; and that if he allow the sale to proceed, he cannot attack the purchaser or his title, the remedy then being in damages against the selling creditor.

(6) If there is any surplus, it is consigned in bank specified in articles of roup, in names of seller and purchaser; and consignation and disposition have effect of disencumbering the property of the seller's and all posterior securities and diligences (1868 Act, s. 123). If there is no surplus, a certificate may be expede and recorded in terms of sec. 48 of 1874 Act.

The Heritable Securities Act, 1894, deals with the following matters, namely: (1) simplification of action of maills and duties; (2) ejection of proprietor in personal possession; (3) creditor's powers of leasing; (4) power to creditor to purchase the property; (5) power to *pari passu* creditor to force sale; (6) assimilation of leasehold securities; and (7) requisition of payment where party cannot be found. Of these, the second, third, and seventh have already been treated; for the first, see MAILLS AND DUTIES, and for the sixth, LEASE.

Power to Purchase.—This is the introduction of the foreclosure principle. The procedure is—

(1) Exposure (after requisition and advertisement as before explained)

at a price not exceeding the amount due under the bond and under any prior and *pari passu* securities, but not including expenses of exposure or prior exposures.

(2) Failing a sale, an application to the Sheriff for a decree forfeiting the right of redemption, and declaring the creditor to be absolute proprietor at a price named, *i.e.* the price at which the property was last exposed.

(3) Decree may be granted accordingly, which, being recorded, disencumbers the property of all securities and diligences posterior to the security of the purchasing creditor.

(4) Or, instead of granting decree, the Sheriff may order re-exposure at a price fixed by him; the creditor may then bid and purchase; and if he purchases, he may grant an absolute disposition to himself as if he were a stranger, or he may obtain decree in the terms above mentioned.

(5) Any surplus is consigned in terms of 1868 Act; or if none, a certificate to that effect is recorded.

(6) The personal obligation of the debtor remains in force for any unpaid balance of the debt.

Sale by pari passu *Bondholder.*—Until 1894, though the holder of a *pari passu* security had a title to exercise the power of sale, he could not force his co-creditor ranking *pari passu* to discharge his security for less than full payment (*Nicholson*, 1891, 19 R. 49); and so it resulted that a sale under such circumstances was practicable only on condition that a price was obtained sufficient to pay off both loans in full, otherwise the whole loss (and not only half of it) would have fallen on the selling creditor. Now, by sec. 11 of the 1894 Act, under such circumstances the Sheriff may grant warrant to sell on the application of a *pari passu* bondholder, "if in his opinion it is reasonable and expedient that such sale should take place"; the Sheriff fixes the price in case of difference in opinion; the expenses are the first charge; and the balance of the price is "paid to the creditors in the securities charged upon the lands according to their just rights and preferences."

Back Letters.—It is very common to insert the rate of 5 per cent. interest in the bond, and to regulate the actual rate by a separate back letter or agreement of that nature. This saves expense on the occasion of changes in the rate of interest; and besides, if a lower rate were specified, and if it were subsequently wished to raise it, the existence of postponed bonds might prevent security being given for such higher rate. Such an agreement may also regulate the duration of the loan. If not attested, it ought at least to be adopted as holograph. The following is a form:—

Agreement between *A. B.*, agent for *X.*, the lender, and *C. D.*, agent for *Y.*, the borrower. Notwithstanding the terms of the bond and disposition in security for £ by *Mr. Y.* in favour of *Mr. X.*, dated , it is agreed as follows:—

1. *Mr. X.* is not to be asked to accept repayment at an earlier term than .

2. Provided the interest is punctually paid, and provided the principal sum is repaid when required in terms of the bond as modified by this agreement, and provided the other obligations in the bond are duly fulfilled, the rate of interest will be restricted to per cent. per annum.

3. Provided the interest is punctually paid, and provided the other obligations in the bond are duly fulfilled, and provided no material change, in *Mr. X.'s* opinion, takes place in the circumstances of *Mr. Y.*, or in the security, the loan will not be called up for payment at an earlier term than .

Special Clauses are necessary in the bond under a great variety of circumstances, including arrangements for prior, *pari passu*, or postponed ranking; obligations for maintenance of life policies; and power to feu.

Ranking.—If the bond is to rank before, or *pari passu* with, bonds

already recorded, by virtue of a power to that effect contained in such latter securities, the new bond should briefly state the power and expressly bear to be granted in exercise of it. There are two ways in which a *pari passu* ranking may be secured: (1) by clauses in the bonds; (2) it is provided by the 1868 Act (s. 142), that when two or more writs transmitted by post to the Keeper of the Register are received at the same time, they shall be deemed to be presented and registered contemporaneously; but this is not a method to be recommended; for one thing, the result does not appear plainly upon a search. A clause of postponed ranking either refers to some specified security about to be granted, or it takes the form of a power to the debtor to create preferable debt not exceeding a certain sum. In the latter case, the chief point is to make it clear whether the proprietor's power is limited to the single constitution of the preferable debt, or whether it authorises successive reborrowings and reconstitutions of securities from time to time, so long as the maximum is not exceeded.

Premiums, etc.—In framing obligations for the maintenance of life policies in heritable securities, it is necessary to have regard to the rule that there can be no indefinite money burden on heritage. The expedient is to specify an annual sum, subject to accounting (*Juridical Styles*, i. 469).

Power to Feu.—A minimum feu-duty will be specified, and clauses are annexed prohibiting the discharge of any security or remedy for recovery of the feu-duties, etc. It may also be necessary to regulate the class of buildings to be allowed. In all feus consented to by the creditor, whether under such a general clause, or under a general deed of consent, or by special consent to the particular feu, there is this risk, that if the obligations incumbent upon the debtor-superior are not duly fulfilled, the creditor cannot enforce payment of the feu-duties (*Arnot*, 1881, 9 R. 89).

Assignation, Restriction, Discharge.—Forms are given respectively in Schedules GG. 00 and NN. of the 1868 Act.

In connection with assignations, the main point is: How is the new lender to satisfy himself that he is getting a good title both to the debtor's personal obligation and the real security? It is laid down that as the security is merely accessory to the debt, it follows that if there is no debt there can be no security; and that therefore, though the Sasine Register shows the bond and disposition in security in its full original force, the fact may be that it may prove worthless to an assignee owing to, *e.g.*, payment having been in part made by the debtor (Ersk. ii. 8. 34; Bell, *Convey.* 1185). Accordingly, it is recommended that the consent of the debtor should be obtained to the transfer (Stair, ii. 3. 22; *Juridical Styles*, 4th ed., i. 676). But if these views are correct in their present application, it is clear that the debtor's consent or admission is not enough, as is pointed out by Bell (*Convey.* 1185). It will bind him, but it will not prejudice postponed creditors or others interested to dispute the real security. It is suggested that there is room for a distinction in this respect between the personal obligation and the real security. It is to be observed that the former may be, and often is, expressly discharged by a deed which is rarely recorded, the real security remaining in force (1874 Act, s. 47). It would be reasonable and consistent with principle to hold that if an assignee relies on the personal obligation, he must make inquiry of the debtor, but that as regards the real security he is entitled to deal on the faith of the records (Bell, *Prin.* s. 14).

The matter of personal searches against heritable creditors is sometimes

raised. It may affect an assignee, the debtor, or a purchaser of the property. The only perfectly safe method is to have such searches from the date of the creditors' respectively acquiring right; at the same time it is most unusual to insist upon this. In the case of a discharge, the debtor himself appears to be safe without such a search, except against the risk of an adjudication not yet feudalised. See Act of Sederunt, 19th February 1680, as regards inhibition, and Bankruptcy Act (s. 111) as regards sequestration.

Creditor's Succession.—Until 1868 heritable securities taken in favour of the creditor, or the creditor "or his heirs and assignees whomsoever" (Securities Act, 1847, Sched. A.), were heritable as regards the succession of the creditor. This was altered by sec. 117 of the 1868 Act. It is provided that from and after 31st December 1868 all heritable securities, whether granted before or after that date, and "in whatever terms the same may be conceived, except in the cases hereinafter provided," shall be moveable in the succession of the creditor, and belong to the executors or representatives *in mobilibus*. The exceptions are: (1) that if executors are expressly excluded, the security is heritable and goes to the heir; and in all cases, even though executors are not excluded, the security is heritable as regards (2) the fisk, (3) rights of husband and wife, and (4) legitim. The words "in whatever terms the same may be conceived" are peculiar. Take the case of a security destined to the creditor "and the heirs-male of his body." It cannot be doubted that this destination would receive effect notwithstanding that it can scarcely be said that there are words "expressly excluding executors," and that the Act provides that, in the absence of such words, the security "in whatever terms conceived" . . . "shall belong to the representatives *in mobilibus*." But if the destination failed to take effect, the bond would be moveable. The exclusion of executors may be in the bond or in an assignation (Sched. GG.) or in a recorded minute. It may be removed by recorded minute or "by assigning, conveying, or bequeathing such security to himself or to any other person without expressing or repeating such exclusion." Apparently the exclusion if contained in the bond or in an assignation, and the removal of the exclusion if resulting from the terms of an assignation, are completed by delivery of the deed; whereas if either the one or the other is intended to be effected by minute, it would appear that the exclusion, or the removal of the exclusion, is not complete until the minute is recorded, and there does not seem to be any warrant for recording it after the creditor's death, when rights at once emerge. *Quære*, Whether a bond is heritable or moveable in the person of the heir after he has succeeded to it by virtue of executors having been excluded? Apparently it is heritable, for the Act provides that where executors are excluded in the security or by minute, "the security shall *continue* to be heritable as regards the succession of the creditor *for the time* holding such heritable security" until the exclusion is removed (cf. *M'Kay*, 1725, Mor. 3224).

The exception regarding the rights of husband and wife excludes all heritable securities from the *jus relictæ* and *jus relicti*, except only interest to date of death. But the rights of terce and courtesy attach, subject to the ordinary rules affecting these rights.

Debtor's Succession.—Heritable securities continue heritable in the succession of the debtor. This holds even though the security may not have been recorded by the creditor till after the debtor's death (M'Laren, *Wills*, ss. 384, 386), the question depending not upon what might be the result in a competition of creditors, but upon the intention of the debtor.

So it was held (*Bell*, 1884, 12 R. 85) that, though there might be doubt as to the validity of the heritable security, still the fact of such security having been constituted showed an intention to burden the heir which must receive effect as between him and the executors. If the specific heritage disponed in security is insufficient to meet the debt, the debtor's other heritage, if any, is liable for the balance in relief of his moveable succession (*Bell, supra*). When two or more properties are charged with the same debt, and these properties descend to different heirs, the incidence of the debt as between the heirs is in proportion to the value of the properties (*Sinclair*, 1798, Hume, 176). If a property which is burdened with a bond is bequeathed, the legatee takes it with its burden; and this rule is not disturbed by a general direction to trustees to pay all debts (*Henderson*, 1858, 20 D. 473; *Brand*, 1892, 19 R. 768).

Completion of Title.—Those acquiring right, whether by testate or intestate succession, to heritable securities in which the deceased was infeft, may complete their titles as follows:—

Testate	Moveable	Writ of Acknowledgment [1] or Notarial Instrument [2]
	Heritable	Notarial Instrument [2]
Intestate	Moveable	Notarial Instrument [3]
	Heritable	Writ of Acknowledgment [1] or Notarial Instrument [4] or Special Service [5]

If the deceased was not infeft, then, whether he died testate or intestate, and whether the succession is heritable or moveable, the only method is by notarial instrument (1868 Act, s. 130, sch. MM).

Before expeding notarial instruments, executors (proceeding as such) must be confirmed, and an heir requires service, which may be general or special; but, as above stated, special service recorded is itself a title to an heir if the ancestor was infeft. An heir of provision completes title by service (*Hare*, 1889, 17 R. 103).

For adjudication of heritable securities, see ADJUDICATION FOR DEBT (p. 107).

Bonds of Annuity with heritable security. The chief points to be kept in view are—that unless terms of redemption are arranged in the bond, the annuity cannot be got rid of, and its existence may create great difficulty in the event of a sale; the ascertainment of the sum for which the annuitant is to rank in the event of a sale by a prior creditor or by himself, if power of sale is conferred (Bell, *Convey.* 1176); and whether an assignee of the annuity can be infeft (Stair, iii. 2. 6; Ersk. ii. 9. 41, 43; Menzies, 819). A creditor ranking after the annuity ought from time to time to call for evidence that the annuity is being paid.

(Menzies, 801; Bell, *Prin.* s. 896; Bell, *Convey.* 1158; M'Laren, *Wills*, 1309; *Juridical Styles*, i. 401).

[1] 1874 Act, s. 63; 1868 Act, sch. II.
[2] 1874 Act, s. 64; 1868 Act, sch. KK; 1868 Act, s. 19, sch. L; 1874 Act, s. 53, sch. N.
[3] 1868 Act, s. 126, sch. JJ.
[4] 1868 Act, s. 128, sch. JJ.
[5] *Juridical Styles*, i. 534.

Bond for Cash Credit in a Bank.—Bonds for cash credits in a bank were introduced by the Royal Bank of Scotland, and have been in existence and daily use since shortly after the foundation of that bank (see BANK). A cash credit is simply an ordinary drawing account upon which the person in whose favour it is granted may operate as on an ordinary current bank account, with this advantage, that interest is only charged on the sums that may from time to time be standing at the debit of the account, and not on the amount stated in the bond. In practice never less than two, and frequently more, persons are taken bound conjunctly and severally with the person in whose favour the account is to be kept, to repay to the bank, up to the amount of the specified sum and interest, such sum as may be due to the bank on the account, including interest, whether the amount have been drawn out by the holder or be due by him in respect of bills, drafts, cheques, etc.

It was at one time doubted whether, if a banker did not enter a bill to the debit of a cash credit at the time of discounting it, he could afterwards do so; or if the bill was not truly for the benefit of the holder of the credit, whether this could be done at all. It has, however, been decided that a banker is entitled to debit the account, with the whole obligations of the principal debtor, whether such advance has been made directly on the security of the bond, or was not at the time specifically brought into the account (*Liddel*, 1820, Bell, *Com.* (M'L's. ed., i. 386)). A bank is entitled to bring the credit to an end at any time, provided it gives due notice to the holder and does not act capriciously, even although the credit may not have been operated upon to its full extent (*Johnston*, 1858, 20 D. 790; *Parkinson*, 1889, 5 T. L. R. 562).

Form of Bond.—The following is the form of a bond of cash credit in name of an individual, with a firm and others conjoined as co-obligants:—

We, *A. B.*, *C. D.*, *E. F.*, and *G. H. & Company*, as a firm or company, and *K. L.* and *M. N.*, the individual partners of said firm or company, as such partners and as individuals, having obtained a credit of pounds sterling with the on cash account in name of me, the said *A. B.*, do therefore hereby bind and oblige ourselves, our heirs, executors, and successors whatever, and all co-partneries under said firm of *G. H. & Company*, present and future, comprehending any of us or of our foresaids, with or without any other partners, and notwithstanding any deaths, retirements, substitutions or additions of partners, dissolution of co-partnery or change therein, all conjunctly and severally, to pay to the or to their assignees, on demand, all such sums not exceeding pounds sterling as are or shall be due to the said from me, the said *A. B.*, whether drawn out on said cash account by me, or liable on me by any drafts, orders, bills, promissory notes, endorsements, receipts, bonds, letters, procurations, guarantees, documents, or legal construction whatever, with interest on such sums severally at the rate of five per cent., or at such other higher rate as shall be charged by the said on cash accounts for the time—the said being hereby allowed to fix the rate of interest from time to time without notice given—until payment, and which with pounds sterling of liquidate penalty, or for costs or charges; cash account may be kept at any office of the said bank, and may be debited with any sums such as aforesaid whensoever by the said bank, without losing any right or remedy of law on bills or otherwise: And any account or certificate signed by the cashier of the said bank, or by any accountant in the said bank, or by the manager or sub-manager or agent or accountant for the office where the said cash account may then or before be kept, shall ascertain, specify, and constitute the sums or balances of principal and interest to be due hereon as aforesaid, and shall warrant hereon all executorials of law for such sums or balances and interest, and for the liquidate penalty aforesaid, whereof no suspension shall pass, but on consignation only: And all costs of discharges and conveyances hereof shall be borne by us and our foresaids, jointly and severally: And we consent to the registration hereof, and of the said account or certificate, for preservation and execution.—In witness whereof.

Liability of the Co-Obligants.—So far as liability to the bank is con-

cerned, all the parties to the bond are liable for the sums drawn out by the holder in the same way as if the drafts had been signed by each of them, the holder of the account being in law considered as the mandatory of the others (Wallace and M'Neil, *Banking Law*, 243). Although those who are in truth cautioners subscribe as principal obligants, and the technical term cautioner is not used, they are nevertheless entitled to the equities of cautioners, though not to the benefits of their legal privileges, such as the prescription applicable to cautionary obligations (*Fleming*, 1825, 4 S. & D. 224; 2 W. & S. 27; *M'Cartney*, 5 W. & S. 504; *Paterson*, 1844, 6 D. 987. See also CAUTIONARY OBLIGATIONS).

The death of the holder of the account necessarily brings the credit to an end. It is otherwise in the case of the co-obligants. Their obligation is a continuing one, remains binding until recalled, and transmits to their representatives, and that although the representatives have no knowledge of its existence (*British Linen Co.*, 1858, 20 D. 557).

Effect of Clause in Bond as to Certificate and Consignation in the Event of a Suspension.—Any of the sureties has the right to call in question the amount of his liability under the bond, and the certificate of a bank official is not conclusive evidence as to the correctness of the account. Evidence *prout de jure* is competent to prove the exact amount payable (*Gilmour*, 1831, 9 S. 907). The stipulation that no suspension is to pass except on consignation, is not effectual, and it is in the discretion of the Court to order consignation or not as may be thought expedient (*Gilmour*, *supra*). BANK; CURRENT DEPOSIT ACCOUNT.

Bond of Bottomry.—See BOTTOMRY.

Bond of Caution.—See CAUTIONARY OBLIGATIONS.

Bond of Corroboration.—A bond under which an existing obligation is corroborated and continued, with or without alteration. The circumstances are many under which such a bond may be granted, including the following: (1) to avoid prescription or limitation; (2) to cure some defect; (3) to accumulate interest; (4) to give the creditor a new obligant, who may be a cautioner, or (5) a purchaser of the security-subjects, or (6) an heir or other successor therein, and (7) to give the creditor's successor a title to the debt without confirmation or other procedure; but this does not, of course, affect liability for Government duties.

Bonds of corroboration are substantive obligations, and support action or diligence without reference to the original documents of debt (*Beg*, 1663, Mor. 16091; *Johnston*, 1676, Mor. 15798).

The narrative clauses are often of great length, but that is unnecessary; the prior obligation may be very briefly set out, and there is no occasion for a detailed deduction of the title of either debtor or creditor. The following is a form:—

I, *A. B.*, considering that I am now infeft in the lands of *X.*, as heir to the late *C. D.*, conform to extract decree of special service by the Sheriff of , dated , and recorded in the division of the General Register of Sasines for the county of on : Further considering that the said estate is burdened with a bond and disposition in security for £1000, granted by the said *C. D.* in favour of *E. F.*, dated , and recorded in the said division of the General Register of Sasines on

, to which *G. H.* has now right by various transmissions: Further considering that as at the term of Whitsunday last there were arrears of interest on the said debt amounting to £100, making a total debt of £1100 which still remains due, and that under these circumstances I have been requested and have agreed to grant these presents: Therefore, without prejudice to the said bond and disposition in security, either as regards the personal obligation or the security thereby constituted, but in corroboration thereof *et accumulando jura juribus*, I bind myself, my heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, to pay the said sum of £1100 to the said *G. H.* or his executors or assignees whomsoever, at the term of Martinmas next, within [*place of payment*], with a fifth part more of liquidate penalty in case of failure, and the interest of said principal sum of £1100 at the rate of per centum per annum from the said term of Whitsunday last [*proceed as in an ordinary personal bond*].

In the above case it is supposed that the bond will give a personal obligation only, leaving the real security to rest upon the original bond and disposition; but if the cause of granting is the existence of any defect in the original real security, of course the new deed will contain a corroborative disposition in security as well.

The Conveyancing Act, 1874 (s. 47), contains provisions intended to obviate the necessity for bonds of corroboration in many cases. It provides that the personal obligations contained in an heritable security shall "transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance . . . without the necessity of a bond of corroboration or other deed or procedure." A warrant to charge is obtained in the Bill Chamber. But in the case of an heir it is difficult to see how this provision can be relied on, for in his case it is expressly "subject to the limitation hereinbefore provided as to the liability of an heir for the debts of his ancestor," that is, he is not liable beyond the value of the ancestor's estate (s. 12); and questions might at any time arise as to its value, or new debts might emerge. In the case of an heir, therefore, there ought always to be an express bond of corroboration; and this applies also in the case of a gratuitous disponee in the absence of such an agreement as is referred to in the Act.

In the case of an onerous disponee (but in his case only—*Carrick*, 1881, 9 R. 242; *Wright*, 1891, 18 R. 841) the Act requires an agreement, *in gremio* of the conveyance, that the security and personal obligations are to transmit. An obligation by the disponee "to free and relieve" the disponer of the debt has been held not to satisfy the requirement of the Act (*Carrick, supra*), though this was doubted in *Wright's* case; but it is submitted that *Carrick's* case was rightly decided (*Kippen*, 1852, 14 D. 533; *Henderson*, 1894, 22 R. 51). For proper form of clause, see *Juridical Styles*, i. 105. The disponee ought to sign the deed, but that is not essential; nor is it necessary that the creditor should be a party to the agreement (*Wright, supra*). But the deed ought to be in the creditor's custody.

The same section (47) of the Conveyancing Act declares that a discharge of the original or any subsequent creditor shall not affect the security if the debt exists. But the "transmission" of the obligation in terms of the Act does not free the original creditor unless a discharge is granted (*Yuill*, 1882, 9 R. 643).

In taking bonds of corroboration it is necessary to bear in mind that they may be struck at as securities for prior debts in the event of bankruptcy supervening within sixty days (*Dunbar*, 1793, Mor. 1027; Bell, *Com.* ii. 198).

The septennial limitation of cautionary obligations does not apply even to express cautioners in bonds of corroboration (*Gordon*, 1748, Mor. 11025).

The stamp duty is 6d. per cent. if the original obligation bears the

mortgage stamp of 2s. 6d. per cent.; otherwise the mortgage stamp is due. And as to exemption in certain cases, see the Stamp Act, 1891, s. 87 (3).

[Menzies, 229: Bell, *Convey.* 290; *Juridical Styles*, i. 475, ii. 340.]

Bond of Presentation—A cautionary obligation entered into for the purpose of gaining for a debtor, against whom personal diligence is being executed, his temporary liberation, and time to implement his obligation.—The ordinary form of bond, which ought to be tested and properly stamped (see *Juridical Styles*, ii. 447), proceeds upon the narrative that the debtor is in custody, in virtue of a warrant, for not making payment to the creditor of a certain debt,—or in virtue of a *meditatio fugæ* warrant,—and the creditor has, at the cautioner's request, agreed to delay incarcerating the debtor, upon the cautioner granting the bond; and thereupon the cautioner binds himself and his heirs to present the debtor to an officer (who is named), holding the warrant against the debtor, at a place named upon a certain date, then and there to be delivered over to the officer; and he further binds himself that the debtor shall then be in the condition in which he is at the granting of the bond, without any sist, suspension, or privilege of any kind which may prevent the warrant from being put into full execution against him; or otherwise, in case of failure to present the debtor, or in case he shall have obtained any sist, or privilege, which may prevent the warrant from being put into execution, the cautioner binds himself and his heirs, etc., to make payment, on a day named, of the principal sum and interest contained in the ground of debt, and the whole expenses that may have been disbursed, and interest to date. The alternative obligation in the case of a *meditatio fugæ* warrant, is to produce the debtor at all diets of Court (Bell, *Dict.*). It would appear that the alternative obligation in each case would follow a failure to produce the debtor, even although not made matter of express covenant. The bond should also contain a clause of registration, in order to warrant summary diligence should the principal obligation not be implemented. In practice it was not unusual to grant a simple letter of presentation, which, if liberation followed thereon, was thus set up *rei interventu*, even though not tested (*Dunmore Coal Co.*, 1 Feb. 1811, F. C.). A promise to present the debtor, or otherwise to pay, being a cautionary obligation, cannot be proved by parole evidence (*Chaplin*, 1842, 4 D. 616).

In early times a certain amount of latitude was permitted in implementing the obligation (*E. Southesk*, 1653, Mor. 1806; *Kennoway*, 1672, Mor. 1806; *Ockley*, 1682, Mor. 1807); but later, since the debtor was relieved from incarceration solely as the result of the cautioner's guarantee that he should be presented at the appointed place and hour, which might be of vital importance, the creditor was held entitled to rigid compliance (*Pitblado*, 1695, Mor. 1808). At the same time, he must act reasonably, and the bond, though strictly, is not to be "judaically" interpreted (*M'Gown*, 1829, 8 S. 142; *Ockley, ut supra*; *M'Farlane*, 1834, 12 S. 699; Bell, *Prin.* s. 278).

The cautioner will be excused from presenting by the debtor's death; while the sickness of the debtor, or any inevitable accident, will entitle the cautioner to delay, provided he present the debtor as soon as the impediment is removed (*Polstead*, 1681, Mor. 1807; *Callander*, 1704, Mor. 1808). On the other hand, the cautioner will not be excused by an impediment caused, or contributed to, by the wilful act of the debtor. For example, the creditor was held liable where the failure to present was due to the enlistment of

the debtor (*Henderson*, 1710, Mor. 1809); and it will not free him to allege that the debtor has had recourse to the Sanctuary, or has obtained a sist of the diligence (*Henderson, ut supra*; Bell, *Prin.* s. 277). It has been doubted, however (Bell, *Com.* ii. 402), notwithstanding the early case of *Polstead* (*ut supra*), whether the cautioner is liable where the debtor meanwhile is imprisoned for another debt, "for this is, in one sense, an inevitable accident, and the creditor has all the benefit that he could have had by himself imprisoning the debtor, there being no preference by priority of personal execution."

Recent legislation has made this form of cautionary obligation comparatively rare, since the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), and the Civil Imprisonment (Scotland) Act, 1882 (45 & 46 Vict. c. 42), have abolished civil imprisonment except in the case of taxes, fines and penalties due to the Crown, rates and assessments, *meditatio fugæ* warrants, and decrees *ad factum præstandum* (Bell, *Com.* ii. 402; Bell, *Prin.* ss. 277, 278; Bell, *Dict. h.t.*; *Juridical Styles*, ii. 447). See IMPRISONMENT (CIVIL).

Bond of Relief.—See CAUTIONARY OBLIGATIONS; RELIEF.

Bond of Respondentia.—See RESPONDENTIA.

Bonding of Goods.—See WAREHOUSING.

Bonorum possessio.—In Roman law the right of succession to the inheritance of a deceased person under the *jus prætorium* was technically known as *bonorum possessio*. Under the prætors the hard and fast rules of succession sanctioned by the old *jus civile* were gradually modified, and the way was paved for the rise of a system of inheritance larger in its scope and more equitable in its application. The prætor had no power to make a man heir (*heres*), but he could give him possession of the inheritance (*bonorum possessor*). Thus, in the classical law, two kinds of succession were recognised: *firstly*, a person might have a right of succession under the old *jus civile* (*hereditas*); *secondly*, he might have a right of succession under the prætorian law (*bonorum possessio*). The grant of *bonorum possessio* did not necessarily imply that the *bonorum possessor* would be protected against one who had a valid civil law title, for the *bonorum possessio* was given either *cum re* or *sine re*. It was given *cum re* when the person to whom it was granted could not be deprived of the property by anyone claiming under a superior title; on the other hand, the grant was *sine re* when it proved ineffectual, by reason of being overridden by someone claiming the inheritance under the *jus civile* (Ulpian, *Reg.* 28. 13; cf. Gaius, iii. 35–8). The prætorian right of succession could never be acquired otherwise than by an application (*agnitio*) to the prætor. Ascendants and descendants might make this claim within a year of their being able to do so; all other persons were allowed only a term of one hundred days. By means of the interdict "*quorum bonorum*," a *bonorum possessor* was enabled to acquire possession of the property left by the deceased (*Dig.* 43. 2; *Cod.* viii. 2). In the later period of Roman law, however, the civil action (*possessoria hereditatis petitio*) which *heredes* had enjoyed for asserting their rights under the *jus civile* was extended to *bonorum possessores* (*Dig.* 5. 5). The *bonorum possessor* only

acquired a bonitarian, not a quiritarian, title to the property which constituted the inheritance, until by usucapion his possession was converted into full quiritarian ownership.

Bonorum possessio was of three kinds:—(1) *Bonorum possessio secundum tabulas*, based on the provisions of a will which was invalid under the *jus civile* on some technical ground or owing to some defect in form. (2) *Bonorum possessio contra tabulas*, which took effect in opposition to the will of the deceased, and was instituted for the benefit of emancipated children. (3) *Bonorum possessio ab intestato*, under which various classes of persons, in a certain order, might have possession of the estate of a defunct intestate awarded to them. At every point, in short, of the law of inheritance during the classical period, we find the prætorian edict face to face with the *jus civile*, seeking to bring the ancient traditional law, in its practical application, into harmony with the requirements of later generations. Finally, Justinian, by his 115th and 118th novels, established a uniform system of inheritance, and by so doing almost entirely did away with *bonorum possessio*. (See *Dig.* 37. 1–5; 38. 6; Puchta, *Inst.* 316–20.)

Bonus.—Any payment of the nature of an honorarium, more generally, however, applied to an extra dividend or allowance to the shareholders of a joint-stock company or to the holders of policies in an insurance company. Shares given free from calls are sometimes called bonus shares (*Imperial Hotel Co.*, 1883, 49 L. T. 149).

As between a transferor and transferee of shares, in the absence of special contract, the right to a bonus accruing thereon is governed by the same rules which are applicable to dividends: the bonus remaining with the transferor if accruing before the date of transfer, if subsequent thereto, passing to the transferee. (See *In re Armstrong*, 1857, 3 Kay & J. 486.)

The same principles apply as between a specific legatee of shares and the testator's residuary estate (Lindley, *Company Law*, 5th ed., 544). Thus a bonus declared after the testator's death goes to the legatee (*M'Laren*, 1861, 3 De G. F. & J. 202; *Bates*, 1862, 31 Beav. 280); if declared before his death, it falls into his executry (see *Dales*, 1871, 40 L. J. Ch. at 246; *Norris*, 1817, 2 Madd. 268), even although the actual term of payment may be subsequent to the date of death (*Lock*, 1859, 27 Beav. 598; *Wright*, 1860, 1 John. & H. 266; but see *Thomson*, 1836, 15 S. 32; *Paterson*, 1838, 1 D. 241—cases of bank stock, in which the term of payment, not the date of declaration, was held to define the rights of parties). Bonuses accruing upon an insurance policy, and which the holder has not elected to apply in reduction of premiums, pass to an assignee of the policy, and do not form part of the *corpus* of the holder's estate (*Gilly*, 1856, 22 Beav. 619).

As between liferenter and fiar, the former will not in general be held entitled to extraordinary profits or bonuses, but only to interest thereon (M'Laren, *Wills*, 3rd ed., i. 582, ii. 837; cf. *Ewing*, 1872, 10 M. 678); but a limited fiar can claim a bonus (*Cumming*, 1824, 2 S. 743; *Cuming*, 1852, 14 D. 363, affd. 19 D. (H. L.) 7).

In the case of a bonus declared upon company shares or stock, the respective interests of parties are determined by the mode in which the company have elected to deal with the profits or other source from which the bonus springs (*Bouch*, 1887, 12 App. Ca. 385, at 397, 401; *In re Barton*, 1868, 5 Eq. 238, at 244). Accordingly, a bonus distributed by the company as profits is regarded as income, and goes to the liferenter; if, on the

other hand, the profits or other fund from which the bonus arises have, by the action of the company, been converted into capital, they will, on distribution, fall to the fiar, the liferenter being merely entitled to interest thereon. Whether a sum distributed as bonus forms capital or income in the hands of the company will be determined upon the following principles:—(1) Profits remain income until legitimately converted into capital, there being no rule by which sums paid out of accumulated profits are necessarily to be treated as capital (*Bouch*, 1885, 29 Ch. D. 635). (2) Conversion of profits into capital is, in each case, a question of fact, having regard to the circumstances and to the constitution and powers of the company. The dedication of profits to capital purposes, or carrying undivided profits to reserve or suspense accounts, although important (see *Nicholson*, 1861, 30 L. J. Ch. 617), is not conclusive evidence of conversion (*In re Bridgewater Co.*, 1891, 2 Ch. 327; *Bouch*, 12 App. Ca. 402). The *onus* of showing conversion lies in such cases upon the fiar (*Dales*, *v.s.*). (3) The time during which the profits have been earned is immaterial, the rights of parties being determined, not by the time of earning, but at the time at which, by the action of the company, they become divisible (*Bouch*, 29 Ch. D. 658. See Lindley, *Company Law*, 545; Buckley, *Company Acts*, 6th ed., 512).

Summarising the various Cases.—(*a*) Where a company having power to increase its capital capitalises its accumulated profits, and thereafter distributes them in the form of a bonus, the bonus is regarded as a capital payment, and falls to the fiar (*Bouch*, 12 App. Ca. 385; *In re Barton*, *supra*, conversion of undivided profits into paid-up capital on newly-created shares). A power in the company to accumulate profits in a reserve fund to meet contingencies, or for equalising dividends, is, in this connection, taken as equivalent to a power to increase capital (*In re Barton*, *supra*).

(*b*) Where a company having no power to increase its capital *de facto* uses accumulated profits as part of its floating capital, and thereafter divides them in the form of bonus, the fiar is entitled thereto (*Irving*, 1803, 4 Pat. 521, revg. *Rollo*, Mor. 8282; *Brander*, 1799, 4 Ves. jun. 800; followed in *Paris*, 1804, 10 Ves. 184a: *Witts*, 1807, 13 Ves. 363. Cf. *Ward*, 1836, 7 Sim. 634). There is, however, a tendency to limit the application of this class of cases.

Where profits have been capitalised by the company, it makes no difference whether the bonus subsequently paid takes the form of cash, or of new shares (*Paris*, *supra*; *Nicolson*, *supra*), or be retained by the company to meet calls upon the shares (*Irving*, *supra*).

(*c*) Where a company clearly treats a bonus as a payment out of income (*In re Hopkins*, 1874, 18 Eq. 696—bonus by insurance company upon quinquennial investigation), or as an increase of ordinary dividend (*Barclay*, 1807, 14 Ves. 66; *Price*, 1847, 15 Sim. 473; *Preston*, 1848, 16 Sim. 163; *Plumbe*, 1860, 29 L. J. Ch. 618), more especially where a company having power to convert profits into capital fails to exercise this power (*In re Alsbury*, 1890, 45 Ch. D. 237, at 245; *In re Hopkins*, *supra*), the liferenter is entitled thereto, to the exclusion of the fiar. An option to the shareholder either to receive a bonus in cash, or as paid-up capital upon new stock, excludes the idea of appropriation by the company to capital; and the liferenter accordingly will in such a case be entitled to the bonus (*In re Northage*, 1891, 60 L. J. Ch. 488).

The operation of the above principles is limited to the case of bonuses declared upon shares in going companies. Profits arising from the realisation of shares in the winding-up or amalgamation of a company fall

to be divided under the ordinary rules applicable to the distribution of surplus assets (*In re Armitage*, 1893, 3 Ch. 337).

The Apportionment Act applies to bonuses (33 & 34 Vict. c. 35, s. 5; *Carr*, 1879, 12 Ch. D. 655). What has been said above must therefore be taken as subject to any rights arising from the law as to apportionment, in cases to which the Statute applies.

Bonuses paid to participating policy-holders of a mutual insurance company are not, in the hands of the company, subject to income-tax under the Revenue Statutes (*New York Life Insurance Co.*, 1889, 14 App. Ca. 381); it is otherwise in the case of a proprietary company (*Last*, 1885, 10 App. Ca. 438, 12 Q. B. D. 389).

Book.—See COPYRIGHT.

Books.—(1) *Official Books, i.e.* books forming the official record of matters of public interest, and kept by persons in the performance of a duty imposed by Statute, or arising *ex officio*, are generally admissible without the oath of the person who prepared them, in proof of facts which it is their function to record; *e.g.* books kept at Government offices (*Kay*, 1836, 10 S. 831; *Dunbar*, 1820, 2 Bli. 351; cf. *Tomkins*, 1 Dow, 404), by the Bank of England (*Mortimer*, 6 M. & W. 68), the log-book of a man-of-war (*Watson*, 4 Camp. 272), and the daily books of a prison (*Aickles*, 1 Leach, 391; cf. *Salte*, 3 Bos. & Pul. 188). The English Admiralty Court has extended this privilege to entries in lighthouse journals and coastguard books (*Maria das Dores*, 32 L. J. P. M. & A. 163; *Catherina Maria*, L. R. 1 A. & E. 53; cf. *Williams*, 1884, 11 R. 982). Parole has been held inadmissible to prove facts of which the books of a burgh (*Gardner*, 1828, 4 Murray, 438; *Black*, 1819, 5 Dow, 23; cf. *Ogilvy*, 6 Feb. 1810, F. C.), or the minutes of a meeting of creditors (*Smith*, 1828, 4 Murray, 404), or of road trustees (*M'Ghie*, 1850, 12 D. 442), or of a Senatus Academicus (*Hamilton*, 1827, 4 Murray, 239), are the proper record. The books themselves may be recovered under a diligence (*Mackintosh*, 1828, 8 S. 184; see Dickson, s. 1648 *et seq.*: PRIVILEGED COMMUNICATIONS). Where the books are public books (see *Sturla*, L. R. 5 App. Ca. 623), copies proved to be correct are generally admissible (*Lynch*, 3 Salk. 154; *Marsh*, 2 Esp. 666; *Salte, supra*; Dickson, s. 1318; Taylor, s. 1598. See BEST EVIDENCE; COPIES). In some cases, books are made by Statute *primâ facie* evidence of the matters therein contained; and, accordingly, the register of members under the Companies Acts is, when proved by an official to be the company register, the proper proof of its contents (*Caledonian and Dumbartonshire Junction Rwy. Co.*, 1855, 17 D. 917; Taylor, ss. 1596–7; cf. *City of Glasgow Bank Liquidators*, 1880, 7 R. 1196). Public books are inadmissible to prove the terms of existing and accessible documents transcribed in them (*Salte, supra*; *Smith*, 1835, 13 S. 323; cf. *A.* v. *B.*, 1858, 20 D. 407); nor can they, in general and apart from Statute, be adduced in favour of the corporation, etc., whose they are, against a stranger (*M'Kenzie*, 1693, 4 Bro. Supp. 54; *Inglis*, 1826, 4 Murray, 77; Taylor, s. 1781). It is difficult to say what mode of subscription is essential to the admissibility of the minutes of public bodies (*King*, 1714, M. 12537; *Oswald*, 1828, 5 Murray, 8; *Ivison*, 1846, 9 D. 1039; *Great Northern Rwy. Co.*, 1850, 13 D. 1315; 1852, 1 Macq. 112; *Forbes*, 1851, 14 D. 134; cf. *Lea*, 1828, 6 S. 353). The privilege accorded to public books is not extended to private registers, or

to the minutes of private bodies; and the proper mode of proving such minutes is by the oath of the person who prepared them. He may use them to refresh his memory (Taylor, s. 1592; Dickson, ss. 1210, 1216, 1217; cf. *Sturrock*, 1849, 12 D. 166). As to the proof of minutes of ancient date, see *Lauderdale Peerage*, 1885, L. R. 10 App. Ca. 692.

(2) *Mercantile Books* are, if regularly kept and presenting the appearance of a *bonâ fide* account, admissible as evidence of matters which it is their function to record (*Buchanan*, 1816, noted in Hume, 422), not only against him (see ADMISSIONS (*c*), (*d*)) whose they are, but in his favour, provided they be supplemented by other evidence, *e.g.* vouchers, where they are to be expected, and, in any case, the oath of the creditor that the account is correct, and that what is charged for was supplied (Ersk. iv. 2. 4; *Ivory*, 1816, 4 Dow, 467; *British Linen Co.*, 1853, 15 D. 314; *Hatton*, 1853, 15 D. 574; cf. *Pickard & Curry*, 1892, 19 R. (H. L.) 56. Mercantile books include the books of bankers (*British Linen Co., supra*. See BANK; BANKER), law agents (*Macqueen & Mackintosh*, 1827, 4 Murray, 193), toll-keepers (*Balfour*, 1833, 11 S. 784), and the like; but the privilege is not extended to private books (*Paterson*, 1819, 2 Murray, 179; *Laing*, 1829, 1 Deas & And. 23; *Smith*, 1826, 5 S. 32; 1830, 4 W. & S. 47; *Catto, Thomson, & Co.*, 1867, 6 M. 54), save in very special circumstances (*Fisher*, 1850, 13 D. 245; *Macfarquhar*, 1869, 7 M. 766). In the absence of a written contract of copartnery, the company books were held conclusive evidence as to each partner's share (*Blair*, 1828, 6 S. 836; cf. *Kenney*, 1836, 14 S. 803; and contrast *Catto, Thomson, & Co., supra*).—See ACCOUNTS; ADMISSIONS (*c*) (*d*); Bankers' Books Evidence Act, 1879 (42 Vict. c. 11)); BEST EVIDENCE; Tait on *Evidence*, 273 *et seq.*; Taylor on *Evidence*, s. 712.

(3) *Histories, Chronicles, Maps, Scientific Books, etc.*—According to the English authorities, "a general history may be admitted to prove a matter relating to the kingdom at large" (Buller, *N. P.* 248), *e.g.* the death of a sovereign; but is inadmissible in regard to matters not of a public or general nature (see Taylor, s. 1785; Roscoe, *N. P.*, 15th ed., 204; *Pieton's Case*, 30 How. St. Tr. 492; *Vaux Peerage*, 5 Cl. & Fin. 538). A county history has been rejected as evidence of boundaries (*Evans*, 6 C. & P. 586); and, in Scotland, an Ordnance Survey map is not sufficient to prove parish boundaries without corroborative evidence (*Gibson*, 1869, 7 M. 394; cf. Taylor, s. 1770 (*b*)); and a private estate plan is in itself not evidence against a third party, who was not party to it, and has not seen it (*Place*, 1874, 1 R. 1202; cf. *Reid*, 1891, 18 R. 744). In matters of ancient date, histories and chronicles compiled, at or near the time when the facts narrated occurred (see *Crawford and Lindsay Peerage*, 2 H. L. 534), are received in Scotland. What weight is to be attached to the relation depends on the credit of the writer, and the character of the adverse evidence (Stair, iv. 42. 16; Ersk. iv. 2. 7). In such matters, private memorials are also admissible, *e.g.* entries in family bibles, and church registers, old plans, inscriptions on tombstones, recitals in deeds and legal proceedings, etc. etc. (Stair, iii. 5. 35; Ersk. iii. 8. 66; *Humphrey's Case*, Swin. 173 *et seq.*; *Shrewsbury Peerage*, 7 H. L. C. 1; *Lauderdale Peerage*, L. R. 10 App. Ca. 692. See BEST EVIDENCE; ADMISSIONS (*c*)). Books of science are not admissible, the proper mode of proving the matters set forth therein being by the examination of scientific witnesses (Dickson, ss. 1224, 1717; Taylor, s. 1422; *Darby*, 1 H. & N. 1; see OPINION EVIDENCE).

In many cases documents not in themselves evidence, *e.g.* almanacs and scientific books, may be used by a witness to refresh his memory (Dickson, ss. 1223, 1777; Taylor, s. 1422). See WITNESS.

[See Dickson, ss. 1205–31; Taylor, ss. 1422–4, 1596–7, 1766 *et seq.*] See Accounts; Admissions; Best Evidence; Copies and Extracts; Registers.

Books of Adjournal.—The books of record in the Court of Justiciary in Scotland. In the High Court the record consists of:—(1) The Scroll Book or Minute Book, which is written in Court by the Clerk of Court, and narrates the sundry steps or minutes of the proceedings; the names, and formerly the depositions, of witnesses; the pleas of panels and the sentences and other judgments of the Court: this was formerly signed by the judge, but, by Act of Adjournal of 1st August 1849, authentication by the signature of the Clerk of Court is sufficient, except for capital sentences. (2) What are called the Warrants of this Minute Book, such as the indictments, petitions, and the like, these are not engrossed in the Minute Book, but are there referred to as to be taken in when the record is copied out and extended. (3) A full and correct copy of the Minute Book and its warrants is made out by the clerks, and is specially known as the "Books of Adjournal." This full copy has been made out since the middle of the seventeenth century. Since that time, therefore, a double record of the Court exists. Acts of Adjournal (*q.v.*) are engrossed in the Minute Book and signed by the presiding judge.

In the Circuit Courts of Justiciary and sittings of the High Court out of Edinburgh, after the distinction between the High Court and the Circuit Courts of Justiciary was abolished by the Criminal Procedure (Scotland) Act, 1887, the original Minute Books and relative warrants are preserved, but no attempt was made to copy or write-up these until 1890. In terms of an Act of Adjournal passed in that year, the principal indictments in cases tried by the High Courts out of Edinburgh, and the relative printed lists of assize are now bound up, and a note in the form of a schedule is appended to each indictment, stating the particulars of the proceedings in the case.

The same Act of Adjournal also makes it no longer necessary to record remissions of sentences in the Minute Books or in the Books of Adjournal; but they are merely bound up consecutively, and a note of each remission is marked on the margin of the Minute Book opposite the sentence to which it has reference.

The record of the proceedings of the Court of Justiciary, in its appellate jurisdiction, consists of the various processes themselves, and a chronological list of them kept in a register called the Appeal Book.

The earliest known volume of the records of the Court of Justiciary is an original Minute Book of the Court for the period from November 1493 to August 1504. The next volume contains the record from December 1507 to July 1513. There are several blanks between that date and 1672, from which the record is complete.

The Clerk of Justiciary is the official custodier of the records of that Court. See Clerk of Justiciary.

Books of Council and Session.—The books of record of the Court of Session, but more particularly the Register of Deeds and Probative Writs, in which may be registered deeds and writs of every kind which contain a warrant of registration for preservation or for execution. By special Statutes (1681, c. 20; 1696, c. 38; 5 Geo. III. c. 72, ss. 42, 43; 1 & 2 Vict. c. 114, ss. 1–9; 45 & 46 Vict. c. 61) the privilege of so registering for execution is extended to bills of exchange and promissory

notes, the acceptance and subscription of which now implies a consent to registration. By 19 & 20 Vict. c. 56, s. 38, all bonds in favour of Her Majesty the Queen may be registered for execution, whether they contain an express warrant for registration or not. See REGISTRATION. The Books of Council and Session are kept in the General Register House at Edinburgh, and are under the custody of the Depute Clerk Register, to whom the duties of Lord Clerk Register were transferred by 42 & 43 Vict. c. 44.

Books of Sederunt.—Minute books kept by the principal clerk of each Division of the Court of Session, in which are entered the names of the judges present at each meeting of the Court. In the Book of Sederunt kept in the First Division are also recorded the admission of the judges, law officers of the Crown, advocates, clerks of court, etc.; the Acts and Orders of Court in all matters which do not fall within the ordinary exercise of its jurisdiction, in particular all ACTS OF SEDERUNT (*q.v.*), and all Orders transferring causes from one Division of the Court to the other, or from one Lord Ordinary to another. In more ancient times these books also contained a record of any communication from the Sovereign or from Parliament to the Court. Although the Court of Session was instituted in 1532, the earliest Book of Sederunt dates from 15th January 1553, and there are several blanks between the four volumes which precede 2nd November 1626, from which date this Record is complete. Like the other Records of the Court of Session, these Books are periodically transferred after completion to the custody of the Depute Clerk Register.

Booking of a Prisoner for Debt—The name applied to the entry in the prison register, at the date of imprisonment, of the amount of the debt, and the name of the person incarcerated.—The magistrates of royal burghs were, by the early Statute, 1597, c. 277, charged with the management of prisons, and were responsible for the safe keeping of a civil prisoner, or for the debt in the event of his escape through want of vigilance (Ersk. iv. 3. 14). For the purpose of keeping a record of the extent of this responsibility, registers were introduced by the magistrates, in which the amount of the debt was entered,—the jailer, and not the creditor, being charged with the duty of booking it (*Schaw*, 1683, Mor. 9354). A fee, proportional to the debt booked, was paid to the jailer. With the object of reducing the jailer's fee, it was, in early times, the usual practice for the creditor to book only a small part of the debt, and to arrest the debtor while in prison for the balance, if he were taking means to procure his liberation. The later practice was to enter the whole debt and pay the corresponding fee to the jailer; and if the debtor paid the debt as it stood in the jail register, and produced his discharge by the creditor, he was freed without the necessity of adopting the early cumbrous procedure of letters of relaxation and liberation from the king, and a charge to the magistrates to set him at liberty (Bell, *Com.* ii. 437).

In order to entitle a debtor to the privilege of the Sanctuary at the Abbey of Holyrood, it was necessary not only that he should be within the precincts, but that his name should be booked in the Record of the Abbey Court. It was only then that the certificate of protection was granted to him by the bailie (*Grant*, 1779, Mor. 5, Hailes, 816; cf. *M'Kellar*, 1861, 23 D. 1269).

By the Prisons (Scotland) Act, 1839, s. 18 (2 & 3 Vict. c. 42), magis-

trates were relieved of all obligations in respect of the management of prisons and custody of prisoners (see *Lamb*, 1865, 3 M. 1105); and now, by the Prisons (Scotland) Act, 1877, s. 5 (40 & 41 Vict. c. 53), all prisons, and the control and safe custody of prisoners, are vested in, and exercised by, one of the Principal Secretaries of State. By sec. 70 of the latter Act the powers possessed by the Sheriff with respect to applications for aliment, and for liberation of civil prisoners, under 23 & 24 Vict. c. 105, are preserved.

The practice of booking continued in all cases till imprisonment for debt was practically abolished by the Debtors (Scotland) Act, 1880, and the Civil Imprisonment (Scotland) Act, 1882; and it is still in force in the few cases where imprisonment is still competent under these Statutes, *i.e.* in the case of rates, taxes, penalties due to the Crown (Bell, *Com.* ii. 436–7, 462–3; Ross, *Lect.* i. 334, 343). See IMPRISONMENT (CIVIL).

Booking, Tenure of.—Booking is the tenure by which lands and buildings in the burgh of Paisley are held. It is known only in that burgh, and is described in the Conveyancing Statutes as "the peculiar tenure of booking." In the Burgage Tenure Act 1860 (s. 23) and the Consolidation Act 1868 (s. 152), it is apparently assimilated in nature to burgage tenure, the tenure in other burghs being referred to as "ordinary burgage tenure." The common element, however, is rather the kind of property to which the tenure applies, than the characteristics of the tenure itself. Booking resembles burgage inasmuch as both apply to burgh property, but it differs from it in these important respects: (1) that the holding is expressly of the burgh, and not of the Crown, and (2) that casualties are exacted both from heirs and from singular successors. The rate is a merk Scots per acre for heirs, and a merk Scots per rood for singular successors.

There is a special register for the registration of the titles. It is kept in Paisley by the town clerk. It is known as the Register of Bookings, Reversions, etc.

Prior to 1860 the form of disposition was as follows:—

Know all men by these presents that I, *A.*, in consideration of the sum of £ , instantly paid to me by *B.*, have sold and disponed, as I hereby sell, alienate, and dispone from me, my heirs and successors, to and in favour of the said *B.*, his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [*description*], together with all right and title I have or can claim to said subjects: In which subjects above disponed I bind and oblige me and my foresaids to book and secure the said *B.* and his foresaids, conform to the order and custom of the burgh of Paisley in such cases, and that by resignation thereof in the hands of the provost, bailies, treasurer, and town council of said burgh, for themselves and as representing the community thereof, immediate lawful superiors of said subjects: And for effecting whereof I hereby make and constitute . . . , and each of them, jointly and severally, my lawful and irrevocable procurators, with full power to compear before my said immediate lawful superiors of said subjects above disponed, or their commissioners in their names duly authorised for that effect, and there by staff and baton, as use is, to resign and surrender, upgive, overgive, and deliver All and Whole the subjects before disponed, lying, bounded, and described as aforesaid, and here held as repeated *brevitatis causa*, in the hands of my said superiors or their commissioners foresaid, in favour and for new and heritable booking thereof to be made, given, and granted to the said *B.* and his foresaids, heritably and irredeemably in due and competent form [*clause of warrandice and assignations of rents and writs*]: And I bind and oblige me and my foresaids to free and relieve the said *B.* and his foresaids of all public and parochial burdens exigible from said subjects at and preceding their term of entry thereto [*delivery of writs and consent to registration*].—In witness whereof.

The disposition was followed by an act of booking, which took place at a council meeting and was recorded in the minutes. The purchaser received

an extract therefrom, known as an "extract booking." The following is a form, and from it will be seen the nature of the ceremony:—

At Paisley upon the [*date*], convened in common council, *C.*, provost; *D.*, *E.*, *F.*, and *G.*, bailies; *H.*, treasurer; *J.*, *K.*, *L.*, *M.*, *N.*, and *O.*, councillors of the burgh of Paisley. On which day compeared *P.*, writer in Paisley, as procurator and attorney for and in name and behalf of *A.*, and exhibited and produced to the said provost, bailies, treasurer, and councillors a disposition dated . . . , made and granted by the said *A.*, whereby, for the consideration therein mentioned, he sold, alienated, and disponed from him, his heirs and successors, to and in favour of *B.*, his heirs and assignees whomsoever, heritably and irredeemably, All and Whole [*description*], as the said disposition containing obligation to book and secure the said *B.*, procuratory of resignation, and sundry other clauses more fully bears: And the said *P.*, as procurator and attorney foresaid, in virtue of the procuratory of resignation contained in the said disposition, by staff and baton, as use is, resigned, surrendered, upgave, overgave, and delivered All and Whole the subjects before described, lying and bounded as aforesaid, and here held as repeated *brevitatis causa*, in the hands of the said provost, bailies, treasurer, and councillors, superiors thereof, in favour and for new and heritable booking thereof to be made, given, and granted to the said *B.*, heritably and irredeemably in due and competent form: Of which resignation the said provost, bailies, treasurer, and councillors, superiors, accepted by receiving the said staff and baton into their hands; and the said resignation having been thus completed, they delivered back the said staff and baton to the said *P.*, who also appeared as attorney for the said *B.*, and accordingly entered and booked, and hereby enter, book, and secure the said *B.* in All and Whole the subjects before described, lying and bounded as aforesaid, and here held as repeated *brevitatis causa*, and that conform to the order and custom of the burgh of Paisley in such cases; whereupon the said *P.*, as attorney foresaid, for and in name of the said *B.*, asked and took instruments in the town clerk's hands, and craved extracts; and the said *B.* paid of composition to *H.*, present town treasurer, . . . Scots for his entry.

Extracted from the records of the burgh of Paisley, upon this and the preceding page, by me, clerk of said burgh.

[*Signature of Town Clerk.*]

As regards completion of title, it will be observed that the cardinal difference between the above disposition and a conveyance of burgage property was, that the obligation was not to infeft and seize, but "to book and secure." It is in accordance with this difference that there never was any ceremony of infeftment upon the ground of the property. The ceremony always took place in face of the council and in the council chamber, while it was not until 1845 that the corresponding change was introduced in the case of burgage tenure.

The procedure in the case of an heir's entry was similar. The heir or his attorney appeared before the council, produced the ancestor's infeftment and evidence of propinquity, if required, whereupon an act of booking was granted, instruments were taken in the hands of the town clerk, the procedure was engrossed in the minutes, and an extract booking was issued.

The Burgage Tenure Act 1860 (ss. 3 and 23) practically superseded the old procedure by allowing the disposition to be recorded, and (ss. 7 and 23) by introducing writs of *clare constat* by the magistrates in favour of heirs. A disposition of property held by this tenure need not now differ from an ordinary disposition. It will be recorded in the register of bookings.

It is frequently the case that the titles bear that the properties are held for payment to the magistrates of an annual sum termed a "duty."

The seats in the three burgh churches, which were erected by the town council, were held by the tenure of booking, and the titles were made up in the form above mentioned.

Sec. 25 of the Conveyancing Act, 1874, so far abolishes the distinction between feu and booking.

The case of *Chalmers* v. *Magistrates of Paisley*, 1829, 7 S. 718, may be referred to. See BURGAGE TENURE.

Border Warrant.—A form of arrestment now in desuetude, but which formerly was a good deal in use in some of the Border counties. The warrant was granted on the application of a creditor to arrest the person or goods of a debtor who resided on the other side of the Border, and to detain him or them until the debtor should find caution *de judicio sisti, i.e.* that he would appear as a party to any action raised on the debt. The procedure for obtaining such a warrant seems to have varied in the different Border counties, but, strictly speaking, it could only be obtained from a Judge Ordinary on the creditor's taking oath as to the verity of the debt; and the debtor, after being arrested, was entitled to an examination as to his domicile by the judge before being committed to prison. For a detailed report of the practice in the different counties, see the case of *Landell*, 1838, 16 S. 388.—[Ersk. i. 2. 19 and 21; Bell, *Com.* ii. 449; Mackay, *Manual*, 57.]

Borrowing.—See Loan; Commodate; Mutuum; Interest; Risk; Trust.

Borrowing Process.—In judicial proceedings in Scotland the process (which comprises the pleadings, interlocutor sheet, productions, and relative inventories) remains, while the suit depends, in the custody of the Clerk of Court. It may be borrowed by the agent for any of the parties upon borrowing receipt written by him or his clerk upon the inventory of process. The principal copy of the summons or other writ by which the proceedings are commenced cannot be borrowed, except at the time of entering appearance, and for the purpose of preparing defences or answers, or for the purpose of using diligence on the dependence, or, in the case of a petition for sequestration, for the purpose of registration (A. S. 11 July 1828, s. 104). A copy of the principal writ, duly certified by the agent, is lodged by him, and may be borrowed when necessary. Neither the interlocutor sheet nor the principal inventory of process may be borrowed. The numbers of process borrowed must be returned within a reasonable time; and if thereafter required by the opposite party or the Court their return may be enforced by Caption (Process) (*q.v.*). In jury trials all processes and productions borrowed must be returned to the clerk two days before the trial if it is to proceed in Edinburgh, and six days if at circuit (A. S. 16 Feb. 1841, s. 23). Borrowed numbers of process should always be returned and the process should be complete whenever the case is in the roll for hearing; and in Inner House cases none of the numbers of process may be borrowed while the case is in the roll. Where a case had been sent to the roll in the Inner House, but had not been put out for hearing, the Court allowed the productions to be borrowed for the purposes of a litigation in England only upon an undertaking by the agents to return them in time for the hearing in the Division (*United Telephone Co.*, 1882, 9 R. 710). When a process is returned, it is the business of the agent to see that the numbers are arranged in proper order, and the clerk must satisfy himself that all the numbers borrowed have been returned. The borrowing receipt is then scored. The regulations applicable to the return, or partial return, of borrowed processes are set forth in A. S. 7 July 1858. When a litigation is ended, the agents on each side should borrow the productions lodged before the process is transmitted to the extractor. This should be done immediately after final judgment has been pronounced, or at all events during the

reading of the Minute Book. After extract, no productions are given up in the Extractor's Chambers, except upon a warrant from the Court. When the process has gone to the custody of the Lord Clerk Register, it must be transmitted to the office of the Clerk of the Court in which it depended before any productions or steps of process may be got up (A. S. 22 Jan. 1876, s. 6).—[See Mackay, *Manual*, 232, *Practice*, i. 452; Coldstream, *Procedure*, 15, 394.]

Bottomry.—The law relating to contracts of bottomry forms one of the most interesting chapters in maritime law. The contract itself dates from an unknown antiquity, and was no doubt well recognised amongst the same commercial nations with whom the *Lex Rhodia de jactu* originated. In the troublous times of the Middle Ages it sank into abeyance; but with the revival of international commerce, it again came largely into use, and in the early decisions of the English Admiralty Courts it figures prominently as the subject of litigation. Its interest now is, however, mainly antiquarian. The introduction of steam as the motive power of vessels, the large increase of capital, and, above all, the development of postal and telegraphic communication, have combined to render it all but obsolete so far as British vessels are concerned. To some extent, however, recourse is still had to bottomry by foreign shipmasters, and many years will probably elapse before it becomes entirely extinct.

Definition.

Bottomry may be defined as the contract by which the master or owner of a ship hypothecates the ship and its appurtenances in security of money advanced to enable the ship to prosecute her voyage, the claim of the lender being made contingent on the arrival of the vessel, and the lender's risk being (usually) compensated by a high rate of interest on the loan. In order to be effectual, the contract must be in writing, but there is no settled form of the instrument, although in practice it usually takes the form of a bond or bill. The document must set out the amount advanced and the premium or interest payable; it must describe the subject or subjects hypothecated, and specify the date after the arrival of the vessel when the stipulated sum becomes due. Provided these things appear in the bond, even although it contain other conditions which are radically vitious, it will be sustained (*Miller & Co.*, 3 R. 105). The bond should also, as matter of good conveyancing, set forth in the narrative, especially in those cases where the master is the borrower, the circumstances which have given rise to the contract, and the necessity for the loan in respect of which the bond is granted.

Maritime Interest.

Repayment of the amount advanced on bottomry being contingent on an event which may be defeated by the perils of the sea, it has always been usual to stipulate for a high rate of interest, to compensate the lender for the risk. The interest so stipulated for was known as maritime interest, and was legally exigible even while the usury laws prevailed. The English Admiralty Courts, however, exercised an equitable jurisdiction in reducing the amount when it was unconscionable, on the same principle as they may decline to give effect to an agreement for payment of salvage. Quite a usual rate of interest when such contracts were common, was thirty per cent. on the sum advanced, a premium which seems large, but was probably not

much out of proportion to the risk incurred. In addition to the total loss of the ship, which put an end to the lender's claim, he ran the risk of the vessel reaching her destination, but in such a condition as to be practically worthless, or of her having put into an intermediate port and borrowed fresh money upon bottomry, which ranked preferably to the earlier bond on the security-subjects. Besides all these risks, claims of salvage, for wages of the crew, and (in England) for damages caused by collision, all took precedence of the claims of the bottomry bondholder on the proceeds of the ship (see LIENS (MARITIME)). On the other hand, the doctrine of constructive total loss was never recognised in connection with bottomry bonds. If the ship continued to exist in specie, however shattered and depreciated, the claim of the bondholder could be made effectual, although its recovery was imperilled by the partial loss of the security-subjects (*Stephens*, L. R. 2 P. C. 516). Even if the vessel never reached her destination, the bondholder could in some cases enforce his claim under the bond, *e.g.* where the vessel had been sold at an intermediate port, or had been lost through an unauthorised deviation of the voyage; in short, in every case where the completion of the voyage was prevented by the wilful or negligent act of the master or owner (Abbott on *Shipping*, 13th ed., p. 175).

The mere fact that interest is not stipulated for in the bond does not affect its validity, if it be clear from the terms of the deed that payment of the principal sum advanced is made contingent on the arrival of the ship; but *in dubio* the absence of any clause providing for interest would go to help the construction that the lender did not intend repayment of the sum advanced to depend on any such contingency, a construction which would be fatal to the validity of the bond (*Miller, supra*). Interest is due from the date when the bond is payable, both on principal and premium, but the Admiralty Court has fixed the rate exigible at 4 per cent.

Bonds by Owners.

Bonds of bottomry granted by the owner or owners of a ship present few points upon which it is necessary to enlarge; indeed, such bonds, although at one time common enough when freights were high relatively to the value of the vessels employed, and commerce as yet undeveloped, have become practically obsolete. Where an owner or part owner of a ship now requires to raise money on the security of his property, he generally does so by mortgage under the provisions of the Merchant Shipping Acts. The security to the lender in such a case is more complete, and not subject to the same contingencies as apply to bottomry. The rate of interest exacted is also correspondingly lower.

Bonds by Master.

Such importance as the subject still possesses is therefore confined to cases where the master of a ship has subscribed a bond of bottomry. His power validly to hypothecate the ship and freight, although he is himself in no way interested as part owner, has always been recognised, but it is subject to the strictest limitations. The Courts have always jealously protected the property of shipowners from being impledged in a foreign port by the shipmaster, unless where the debt has been incurred in their interests. Accordingly, it almost goes without saying that a shipmaster is not entitled to grant a bottomry bond over the ship and freight for a debt of his own: and even where the bond is executed for the purpose of securing a debt due by the owner, its validity will not always be sustained.

Essentials to Validity—(1.) *Communication with Owners.*

Before hypothecating the ship under such a contract as bottomry, the master must communicate with the owners, if it is at all practicable for him to do so; and no bottomry bond will be sustained where this has not been done. The reason of the rule is, that as the maritime interest usually stipulated will absorb a large proportion of the profits of the voyage, the master is not entitled to have recourse to an exceptional expedient for raising money, without giving his owners an opportunity of raising the necessary funds on cheaper terms. Where the master can communicate by telegraph, he must avail himself of that medium: but where no telegraphic communication exists, "if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken that it is his duty to so, or at least to make an attempt" (*The Oriental*, 7 Moo. P. C. C. 398; *Klinwort*, 2 App. Ca. 156). Even if the owner be insolvent, the master must communicate with him before he is entitled to grant a bottomry bond; and if the owner is bankrupt, the communication must be made to his trustee (*The Panama*, L. R. 3 P. C. 199). It is to this rule, now firmly settled in British maritime law, that the diminished importance of bottomry bonds is mainly due. With the enormously improved methods of communication, the master is now rarely placed in circumstances in which he cannot communicate with the owners before requiring to raise money on bottomry. Their express consent, when given, will avoid many of the questions which might otherwise arise; and in the event of their express refusal, no valid bond could be granted by the master.

Cases, however, may still arise, in connection with distant or little frequented ports, where the master's power to hypothecate the ship and freight by means of a bottomry bond requires to be considered. The common case is that of a vessel driven by stress of weather into some foreign port, which she is unable to leave without undergoing repairs, or obtaining fresh provisions for the crew. The master has, as a rule, no funds at his own disposal, and no credit upon which he can obtain advances. His only course is to hypothecate the ship in security of such advances as are necessary to enable him to prosecute the voyage, and such hypothecation will, in the general case, be greatly in the interests of the shipowner, as presenting the only alternative to a sale of the ship. In the days when money could not be remitted by telegraph, and when the only communication between foreign countries was maintained by means of sailing ships, the necessity of conferring such powers on the captain was fully appreciated; and L. Stowell considered that, in the interests of commerce, bonds of this kind should be regarded as of a high and privileged nature, and upheld with a very strong hand (*Alexander*, 1 Dod. 278). Under the altered conditions of commerce, these observations can apply only to a very limited class of cases.

(2.) *Loan must be Necessary.*

The foundation of the master's authority in all such cases is necessity (*The Karnak*, L. R. 2 P. C. 505, 513). The advances in respect of which the bottomry bond is granted must be advances without which the voyage could not be prosecuted. This implies that the advances could not have been obtained in any other way less burdensome to the owner than on a contract of bottomry. If, for instance, the master can obtain a loan on the credit of his owners, or upon a bill drawn by him on his owners, or even on

his own credit, he is not entitled to hypothecate the ship or freight. But it is not necessary that the advances should be required in order to fit the ship for the prosecution of the voyage. If, for instance, the ship has been attached for debt, and its release cannot be obtained without borrowing money on bottomry, the master is entitled to grant a bottomry bond in consideration of the advances (*The Prince George*, 4 Moo. P. C. C. 21; but see *The Ida*, L. R. 3 A. & E. 542). But a debt of the owners, if it would not enable the creditor, in the particular port in which the ship happens to be, to arrest the ship, is not a good subject of bottomry; nor will the arrest of the master for his owner's liability give him the necessary authority, for even if he were arrested, the creditor could not thereby detain the ship. It follows from this, that if supplies have already been furnished on the personal credit of the owners, the master is not entitled to grant a bottomry bond for the amount. Apparently, in such a case, it would be the master's duty to endeavour to commence the voyage before the creditor could take proceedings to arrest the ship; and no mere threat of such proceedings would justify the granting of a bottomry bond, unless it were certain that they would be carried into effect in time to prevent the ship's departure.

Lender's Duties.

The authority of the master being thus limited, the prudent lender on bottomry will, in his own interest, make inquiries both as to the purpose for which the advance is desired, and the impossibility of the captain obtaining it upon less onerous terms. If, however, the money is required for repairs or outfit, and cannot otherwise be raised, the lender on bottomry is not bound to see to its proper application, nor to secure that the whole of it is expended for the benefit of the ship. Where the lender is the agent of the shipowner, the transaction will be more strictly inquired into than when he is a stranger.

Personal Obligation on Master or Owners.

On the subject of the rights and responsibilities arising on a contract of bottomry entered into by a master, there is a singular conflict of opinion. Erskine lays it down that it imposes no personal obligation upon the borrower (Ersk. iii. 3. 17). On the other hand, Bell, in his *Commentaries*, is equally clear the other way. A bond of bottomry over the ship, he says, "of course binds the ship and owners without any qualification." And again, in dealing with Erskine's view,—which he alleges to be contrary to all the authorities,—he asserts that the controversy in other countries has been whether it creates any other than a personal obligation. On the other hand, L. Tenterden, in speaking of the power of the master to pledge the ship by a bond of bottomry, remarks: "Where this is done, the owners are never personally responsible; the remedy of the lender is against the master or the ship." This latter view seems to be in accordance with the bulk of the authorities, both in Scotland and in England (*Cochrane*, 14 Feb. 1854; *Stainbert*, 22 L. J. Ex. 341). The contradictory views of Bell and Erskine are probably in part due to their having in view bonds in different forms. If the bond contains no personal obligation on the borrower, it is difficult to see how one will be implied; and again, if the master or owner personally binds himself for repayment of the advance and premium, there is no reason why the obligation should not be enforced. The former view has been given effect to both in England and America (*The Salacia*, Lush. 545, 548; and *The Bark Irene*, 2 Asp. Mar. Law Ca. (N. S.) 155). Even Lord Tenterden's rule must, it is thought, be confined to cases where it has not been

practicable for the master to communicate with the owners. In such cases, whether he binds himself personally or professes to bind only his owners, the master alone will be bound; but upon what principle he should be held liable when he is acting upon the direct instructions of his principal, and does not agree to be personally bound, it is not easy to see. Perhaps the master's responsibility may be justified on the footing that it operates as a restraint on his power of hypothecating the property of the shipowner; but it seems contrary to justice, that if money has been properly borrowed by the master for his owner's benefit, his estate should be liable (apart from express stipulation) to make good any deficiency which may be caused by subsequent perils to which the vessel has been exposed.

Mode of Enforcing.

The ordinary mode of enforcing a bottomry bond is by an action of declarator of lien over the ship, followed by conclusions for sale of the ship, and the application of the proceeds towards the debt of the bondholder. After the vessel has been sold and the proceeds consigned, the Lord Ordinary usually orders claims to be advertised for, and, in the event of competing claims being lodged, the action is practically converted into a multiplepoinding, and a record made up on the condescendences and claims in the usual way. Where the action is laid upon a bottomry bond granted by the master, for which the owners are not personally liable, there may be difficulty in securing the ship by arrestment in the ordinary way. In such circumstances the Court will grant a special warrant to arrest on a petition being presented to either Division (*Lucavich*, 12 R. 1090).

Law Applicable.

As the laws of the different maritime nations vary considerably as to the prerequisites of valid bottomry (the British law being, in this respect, most stringent), it is of importance to know according to what law the validity of a bond granted in one country and payable in another falls to be determined. This was settled in the important case of *Lloyd* v. *Guibert* (L. R. 1 Q. B. 115), where it was held that the law of the flag must in all cases be applied. The principle of this decision is, "that the flag of the ship is notice to all the world that the master's authority is that conferred by the law of that flag, that his mandate is contained in the law of that country, with which those who deal with him must make themselves acquainted at their peril." This may operate somewhat hardly on the bondholder, who, at most, is expected to be acquainted with the law of his own country: but it must now be taken that the risk of his making a mistake as to the law applicable to the foreign shipmaster is just one of the risks to be compensated, like the others, by the maritime interest exacted.

Bonds over Freight.

In the foregoing remarks attention has confined to a bottomry bond over the ship alone. As a rule, however, such bonds also include the freight; and it may be laid down as a general rule, that wherever the master may pledge the ship, he may also pledge the freight. From the freight payable at the end of the voyage, the charterer is entitled, as in a question with the bondholder, to deduct any advances made under any *bonâ fide* arrangement for forehand payment before the bottomry is required (*The Karnak*, *supra*).

Where the ship and freight are insufficient security, the master may—under certain circumstances—hypothecate the cargo along with the ship

and freight. The instrument by which this is done is known as a bond of bottomry and respondentia. The rules affecting the validity of such a bond, so far as the cargo is concerned, are somewhat special, and require separate treatment. See RESPONDENTIA.

Bought and Sold Note.—"When a broker has succeeded in making a contract, he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note; to the buyer, the bought note" (Benjamin on *Sale*, 251). But there is not in Scotland any necessity, as by the practice of England, for a signed note to be entered in the broker's book (Bell, *Prin.* s. 89).

There are three forms of bought and sold note in general use, and the differences in them are of importance in considering questions of the broker's liability. The *first* and complete form begins: "Sold for *A. B.* to *C. D.*," or "bought for *C. D.* from *A. B.*"; then follow the terms of the contract, and each note is signed by the broker "*E. F.*, broker." The importance of this form of note lies in the names of the principals being disclosed, and the broker's character appearing from his signature. It follows that the broker can neither sue nor be sued on such a contract (*Fairlie*, 5 Exch. 169). The *second* form of note begins: "Sold for *A. B.*," or "sold for *A. B.* to our principals," and is signed "*E. F.*, broker." *Primâ facie* the broker is not liable on such a contract; but it is competent to show that by usage of a particular trade he is liable (*Humfrey*, 7 El. & Bl. 266; *Fleet*, 7 Q. B. 126). The *third* form of note is this: "Sold to *A. B.* by me," and is signed by the broker without adding the word "broker." In this case the broker assumes the obligation of a principal, and cannot escape responsibility by parole proof that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an unnamed principal, and to make this principal responsible (Benjamin on *Sale*, 252; Bell, *Com.* i. 460; *Higgins*, 8 M. & W. 834; *Calder*, 6 C. P. 486). See BROKER. Another form of note may be mentioned, where the broker professes to sign as a broker, but is really the principal, as in *Mollett*, L. R. 7 H. L. 802. In such a case his signature does not bind the other party, and he cannot sue on the contract.

In England there has been much litigation as to the effect of bought and sold notes as evidence of the completion of the contract, and as to the effect of discrepancies between them and entries in the broker's book; but the decisions have mainly turned on the 17th sec. of the Statute of Frauds, as repeated in the 4th sec. of the Sale of Goods Act, 1893: "To us who are not bound by the Statute of Frauds, these decisions are not of direct importance. Where, as with us, the broker has no direct power to buy or sell without reference to his principals, or one of them; where, in short, he is a mere *internuntius* proposing terms and conducting the negotiations, but with a power of dissent in the parties, the sending of a bought note to the one, and a sold note to the other, not *debito tempore* rejected by either, will complete the contract, as being evidence of *consensus ad idem* on the part of both principals" (Bell, *Com.* i. 460 (note by Lord M'Laren)). It may, however, be well to state shortly the effect of the English decisions as deduced from the authorities by Mr. Benjamin in his book on *Sale*, 268–70:—

(1) The broker's signed entry is the original contract, and is binding

on both parties. (2) The bought and sold notes do not *constitute* the contract; but (3) they suffice to satisfy the Statute when they correspond. (4) Either note will suffice, so long as there is no variance between it and the other note, or between it and the signed entry. (5) Where one note is offered, the defendant may show the other to prove variance. (But it is not a variance that one note names the broker's principal, and the other does not [*Cropper*, 3 C. P. 199]). (6) Where there is variance, the signed entry will generally control the case. If the bought and sold notes correspond, but, taken collectively, vary from the signed entry, it is a question of fact whether a new contract has been made modifying that entered in the book. (7) If the notes vary, and there is no entry nor any other writing, such as correspondence, showing the terms of the bargain, there is no valid contract. (8) When a broker sells on credit, the vendor may retract within a reasonable time if he is dissatisfied with the solvency of the buyer. It may be observed that these propositions are contained in the judgments in *Sievewright*, 17 Q. B. 103, and *Hodgson*, 2 Camp. 530.

A bought and sold note requires a penny stamp (33 & 34 Vict. c. 97).

[Bell, *Com.* i. 459; Bell, *Prin.* s. 89; Benjamin on *Sale*, 250 *et seq.*; Blackburn on *Sale*, 81; Smith, *Mercantile Law*, 631 *et seq.*; Campbell, *Commercial Agency*, 653 *et seq.*; *Towill & Co.*, 3 R. 117.] See BROKER.

Bounding Charter (*Boundaries*).—The term "bounding charter," or bounding title, is used to describe a charter or other title in which the property is limited by boundary, either expressly or in effect. It may be observed that almost every title is a "bounding title"; and no doubt that is so in modern times, and in the case of smaller holdings. But the titles of large estates are usually not of that description; there the lands are usually described by some old general name, and no boundaries are given. It was by contrast with such general or "unbounded" titles that the phrase "bounding charter" came into use and significance. The specification of boundaries has important legal effects not only (1) by reason of *any* boundary being laid down, but also (2) according to the particular kind of boundary, and the exact words used in connection with it.

The first question, then, is, In what ways may a bounding title be constituted? The general answer is, By any means which either expressly or in effect limit the grant, and thus convey only an *ager limitatus*. The following reach that result:—(1) Express boundaries (or boundary) stated in the deed; (2) plan referred to as showing the boundaries (*N. B. Ry. Co.*, 1862, 1 M. 200); (3) boundaries on three sides and measurement (*Stewart*, 1866, 4 M. 283); (4) the specification of parish or county (*Hepburn*, 1823, 2 S. 459; *Gordon*, 1850, 13 D. 1). "The true question is whether the boundaries are specified, and, if they are, whether they can be identified" (*Reid*, 1879, 7 R. 84). But *quære* as to the effect of an unbounded infeftment followed by a decree arbitral settling marches (*Beaumont*, 1843, 5 D. 1337). "Merkland" is not a bounding title (*Spence*, 1839, 1 D. 415). The case cited related to land in Shetland, and local specialties were involved: but the same would hold in any part of the country, the reason being that "merkland" measures the value, not the extent.

The next matter is to consider what is the legal effect of a bounding title. The effects are: (1) no corporeal right of property can be acquired beyond the boundary, not even by the fullest possession for the prescriptive period (Bell, *Prin.* 738, and cases cited); but (2) incorporeal property rights, such as salmon fishings, may be so acquired (*Earl Zetland*,

1873, 11 M. 469); and (3) so may rights of servitude (*Liston*, 1835, 14 S. 97; *Beaumont, supra*). The first of these rules necessarily flows from the essentials of a prescriptive title. To enable prescription to operate there must be (1) a title *to which the possession may be referred*, and (2) the necessary possession following thereon. Here *ex hypothesi* there is the possession: the question is, Can it be referred to the title; will the title support it? But it is obvious that in the case supposed (namely, a bounding title *plus* twenty years' possession beyond the boundary), so far from the title supporting the possession, a reference to the title at once brands the possession as unwarranted and vitious (*St. Monance*, 1845, 7 D. 582). That, at least, is the case where an apt and suitable boundary has been chosen, and where it remains in its original state. But these conditions are not always fulfilled; and in proportion as they fail, the special force and virtue of a bounding title are endangered, and possession becomes relevant and important. Thus the local arrangements may have altered; and though it is laid down that "a title will remain not the less a bounding title although every trace by which it was recognised has disappeared" (*Reid, supra*), still, under these circumstances, proof must be resorted to, and that will always, in fact, give openings for possession telling with force. But further, the very nature of the boundary as originally specified may be such as to necessitate, and indeed invite, proof of possession. Such cases are found where lands are said to be bounded by other lands identified either by their own general name or the name of their owner. It is laid down, and indeed is obvious, that when lands are "bounded by another subject, the precise extent or line of boundary of which subject is itself disputed, then evidence may be received in order to ascertain the latter boundary" (*Davidson*, 1845, 7 D. 342). In one case it was said that often there could not be a better boundary than the naming of the adjoining owner (*Reid, supra*); but, with deference, it is submitted that practically there is then no boundary at all. It must be kept in view (as was stated in *Reid*), that what is truly referred to in such a case is the line of the adjoining proprietor's land, not as specified in his titles, but as evidenced to the world by physical objects and by possession.

A proper and complete bounding title is one which has the boundaries on all sides specified. Still, the specification of a boundary on any side has so far the same legal effect. But obviously, especially in the case of considerable estates, it may be difficult to determine the effect of such partial bounding as regards a discontiguous pertinent.

There are certain cases of apparent exceptions to the rule that corporeal property cannot be acquired beyond the boundary. These, however, turn on the nature of the boundary as a shifting line. In one case (*Blyth*, 1883, 11 R. 99) a piece of ground was feued out as bounded "by the river Clyde at low water." Thereafter the river receded more than 100 feet. It was held, in a question between superior and vassal, that the land thus gained belonged to the vassal.

The rule that the incorporeal property right of salmon fishings may be prescribed on a bounding charter is a necessary consequent when once it is held that an express grant of salmon fishings is not required. For in all such cases the question is whether the owner of the lands has prescribed the fishings. But the right of fishing is an aquatic right. It can be exercised only *extra finem terræ*, and therefore it would be a contradiction to hold that a bounding charter created any difficulty.

Again, the rule that such a charter is no impediment to the acquisition

of servitudes beyond the boundaries, is also rested on firm ground. It is the corporeal *property* that is bounded. But that is no reason why rights (other than corporeal property) beyond the boundary should not run with the lands. Indeed, it is obvious that there must be such rights. For instance, there must be right of access to the property. "It does not follow that this bounded property may not have various servitudes. In fact an estate, however bounded, must have some rights reaching beyond the bounds. It must, for instance, have a right of access. But why may it not have others?" (*Beaumont, supra*). But two things must be established, viz.: (1) forty years' possession along with the principal subject (*Lord Adv.* v. *Hunt*, 1867, 5 M. (H. L.) 1): and (2) the relation of a dominant tenement, on the one hand, and a servitude right, and not an auxiliary right of property, on the other (*Beaumont, supra*).

The following are some of the kinds of boundaries which have been the subject of judicial construction:—

Sea[1] . . .	Low-water mark of ordinary spring-tides, but reserving the public use of the foreshore.
Sea-shore[2] .	
Sea-beach[3] .	
Tidal river[4] .	
Full sea . .	High-water mark of ordinary spring-tides.[5] But where a feu was granted bounded by the sea flood, and the granter's own title did not expressly carry him farther seaward, it was held that he had given out all he had, and that he could not interject himself between his vassal and the sea.[6]
Sea flood .	
Flood mark .	
Non-tidal river .	*Medium filum.*[7]
Road . . .	If road is boundary between two estates, there is presumption for *medium filum.*[8] But "bounded by a road" excludes the road.[9]
Canal . .	Excludes both canal and towing-path.[10]
March stones .	In absence of natural features, the presumption is for a straight line between the stones.[11]
Wall . . .	The inside of the wall: the wall itself and *solum* thereof being excluded.[12] If the contrary is intended, the expression should be "together with the walls and the *solum* thereof."
Mutual wall .	It is usually laid down that the boundary is the *medium filum* of the *solum*, and that each proprietor has a right of property in the wall *ad medium filum*, and an interest in the other half entitling him to prevent alterations. But an alternative view is that the respective rights of exclusive property are bounded by the respective sides of the wall, and that *solum* and wall are held *pro indiviso*. But in either case the practical result is the same: neither proprietor can alter the wall.[13]

[1] *Boucher*, 1814, F. C. 64.
[2] *Culross*, 1809, Hume, 554.
[3] *Cameron*, 1848, 10 D. 446.
[4] *Todd*, 1840, 2 D. 357, and 2 Rob. 333.
[5] *Berry*, 1840, 3 D. 205; *St. Monance, supra*; *Keiller*, 1886, 14 R. 191.
[6] *Hunter*, 1869, 7 M. 899.
[7] *Gibson*, 1869, 7 M. 394, and cases cited.
[8] *Wishart*, 1853, 1 Macq. 389.
[9] *Argyllshire Comrs.* v. *Campbell*, 1885, 12 R. 1255.
[10] *Fleming*, 1841, 3 D. 1015.
[11] *Ewing*, 1828, 6 S. 417; *Dalhousie*, 1890, 17 R. 1060.
[12] *Smyth*, 1813, 5 Patten, 669.
[13] Rankine, 542, 556.

Lateral boundary, seaward	The rule, both as regards foreshore and salmon fishings, is that a line is to be drawn representing the average direction of the coast, and that from the land boundary a perpendicular is to be dropped on such line. The perpendicular is the boundary.[1]
Lateral boundary in river estuary	A similar rule, but the first line is drawn to represent the average direction of the *medium filum* of whole channel (both salt and fresh water) at ebb tide.[2]

It remains to refer to questions of conflict between boundaries and other particulars of the property. Collision between boundaries and plan is really a case of conflicting boundaries. If in that case measurements are also given, the boundaries or plan will be preferred according as the one or the other is supported by the measurements (*N. B. Rwy.* 1879, 6 R. 640). In the case cited, the measurements and plan coinciding, confined the proprietor to less than the boundaries would have given him. The case was expressly recognised as one of bounding title, yet strangely (though rightly) enough the literal "boundaries" were rejected. In an ordinary case of collision between boundaries and measurement, the rule of contract between seller and purchaser is, that "if the measurement is taxative, or is an essential of the contract, there is right to resile if there is substantial error in extent" (*Hepburn*, 1781, Mor. 14168; *Gray*, 1801, M. App. Sale, No. 2); it is otherwise if the measurement is descriptive merely (*Hannay*, 1785, Mor. 13334; *Brown*, 1813, Hume, 700). In a matter of competition of titles, if the measurement would give a larger area than the boundaries, and these are clear, it is difficult to see how, in the ordinary case, more than the boundaries could be claimed (*Currie*, 1888, 16 R. 237). In the converse case, if the boundaries are clear, the measurement will not limit (*Douglas*, 1630, Mor. 2262; L. Young in *Currie, supra*), unless expressly taxative.

Bowing, or **Bowing of Cows.**—In this contract the proprietor or principal tenant, who is owner of a stock of cows, lets them, with the privilege of grazing them on the farm, to a party who is called a "bower." Arrangement is usually made for shifting the pasturage, and for accommodation in byres; while other privileges, such as the right of conveyance to market, and to supplies of turnips, hay, cut grass, and other food for cattle, may accompany the grant. The rent paid is so much per cow. The owner or principal tenant pays public and parochial burdens. He remains owner of the cows, bears the risk, unless there is a contrary stipulation, of their dying or becoming unfit to yield milk (*Logan*, 1872, *Journ. of Juris.* 16, 271; *Kerr*, 1892, 8 Sh. Ct. Rep. 152), and must report to the local authority any outbreak of contagious disease among them (*Robertson*, 10 R. J. 68).

Earlier writers (*e.g.* Hunter, *ut infra*) were inclined to regard a "bower" as merely a manager for the lessor paid for his services in kind; and the contract as one of hire rather than of lease. More recent writers (Rankine, *ut infra*), however, describe bowing as a mixed contract of lease and hiring (see *Mackinnons*, 1894, 2 S. L. T. No. 11). At common law the cheeses made by the bower are subject to the landlord's hypothec in the event of non-payment of rent (*Goldie*, 1839, 1 D. 426; see Hunter's *Landlord and Tenant*, 1., 358; Rankine, *Leases* (2nd ed.), 268, 269). See LEASE.

[1] *M'Taggart*, 1867, 5 M. 534; *Keith*, 1884, 12 R. 66.
[2] *Laird*, 1871, 9 M. 699, 1009; *Gray*, 1885, 12 R. 530.

Box-days.—Two days are appointed by the Court in each vacation, and one day in the Christmas recess, for the boxing of papers (31 & 32 Vict. c. 100, s. 4). On these days the judges' clerks attend in the Parliament House, and receive papers for the boxes of the judges and officials of the Court. The offices of the clerks are open every day during the week in which the box-day is fixed, and during the subsequent week every day except Saturday. Summonses may be called, and defences or other pleadings may be returned, at any of the box-days in vacation or recess. To be called on the box-day, summonses must be lodged two days before (A. S. 14 October 1868, s. 10). The defender has the box-day and the two subsequent days to enter appearance (A. S. 1868, s. 11). There is no box-day in the February week; during that recess the clerks attend every day. See CLERK OF SESSION.

Boxing.—The lodging of papers in the judges' boxes. Boxing in reclaiming notes is regulated by the Judicature Act, 6 Geo. IV. c. 120, sec. 18; A. S., 11 July 1828, s. 77, and A. S., 24 December 1838, s. 12. By the Judicature Act it is provided the reclaimer shall "print and put into the boxes appointed . . . a note reciting the Lord Ordinary's interlocutor, . . . and, along with the note as above directed, put into the boxes printed copies of the record. . . ." By A. S. 1838, it is provided that when reclaiming notes are lodged against the interlocutor of a Lord Ordinary, there shall be lodged therewith "a printed copy of the notes of advocation or suspension, as the case may be, and of the summons, defences, and record in the inferior Court, together with the additional record, if any, and notes of pleas made up in this Court." By A. S. 1828, s. 77, it is provided that reclaiming notes "shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the Statute, if the record has been closed; and also copies of the letters of suspension and advocation, and of the summons with amendment, if any, and defences (excepting summonses of multiplepoinding, adjudication, constitution, wakening, transference, and cessio bonorum, and defences therein). Documents which have been boxed within two years of the date at which they are again referred to, do not require to be re-boxed, A. S. 1838. Boxing within the reclaiming days is imperative; failure to comply renders the reclaiming note incompetent, (*M'Evoy* 1891, 18 R. 417, and cases therein cited). The whole record, including the summons, must be boxed (*M'Evoy, ut supra*; *Miller*, 1863, 2 M. 225; *Muir*, 1874, 2 R. 26).

Boxing, in appeals from the Sheriff Court, is finally regulated by A. S. 10 March 1870, sec. 3 of which alters the course of procedure prescribed by the 71st sec. of the Court of Session Act, 1868. It is therein set forth that the appellant, within fourteen days after the process has been received by the clerk of court, shall in session print and box the note of appeal, record, interlocutors, and proof, if any, unless he shall have received an interlocutor dispensing with printing in whole or in part; and in vacation he shall, within fourteen days after the process has been received, deposit the said papers with the clerk, and box copies on the box-day or sederunt-day next following; and if he fail to do this, he shall be held to have abandoned his appeal, and shall not be entitled to insist therein, except upon being reponed (*Harvey*, 1875, 2 R. 980; *Greig*, 1880, 8 R. 41; but see *Robertson*, 1877, 15 S. L. R. 160). Where, however, the omission is merely formal, the Court may allow it to be rectified (*Young*, 1875, 2 R. 456; *Latimer*, 1881, 9 R. 370).

Breach of Arrestment.—See ARRESTMENT.

Breach of Contract.—See CONTRACT; DAMAGES.

Breach of Interdict.—An INTERDICT (*q.v.*) necessarily gives only a negative remedy. Under it a person is not ordained to do anything, but is ordained by decree of Court to abstain from doing a certain act which, but for the decree, he would have been entitled to do. It therefore cannot be enforced directly. But of course a person against whom such a decree is obtained may fail to obey it. When he does so he commits what is technically called a breach of interdict, and is liable to be punished for being guilty of an act of contempt of Court, and for breach of the particular interdict. Breach of interdict is thus a branch of the category of law known as CONTEMPT OF COURT (*q.v.*). When an interdict is broken and redress is desired, the party who has obtained the interdict presents a PETITION AND COMPLAINT (*q.v.*) to the Court, in which it is asked to find that the respondent "has been guilty of a breach of the interdict against him . . . . and of a contempt of the authority of this Court." Such an application is of a quasi-criminal nature and requires the concurrence of the public prosecutor, at least when there are penal conclusions in the prayer (*D. Northumberland*, 10 S. 366; *Usher*, 1 D. 639). A petition for breach of interdict, however, is not a criminal proceeding in the sense of the Statute 16 Viet. c. 20, s. 3, which only permits parties, or their husbands or wives, to give evidence in civil cases, and therefore the respondent, or the husband or wife of the respondent, is a competent witness in such proceedings (*Christie Miller*, 6 R. 1215).

The application for the breach must be brought in the court which granted the interdict, for it is the authority of that court that has been disregarded. In the case of the Court of Session, however, the petition and complaint is an Inner House proceeding, even though the interdict has been granted in the Outer House (per L. Curriehill in *M'Neill*, 4 M. 608). If the complaint is made in the Sheriff Court, the procedure is the same as in the Court of Session, except that the concurrence of the procurator-fiscal is obtained instead of that of the Lord Advocate (*Henderson*, 1 R. 920).

Although a petition and complaint is a proceeding of a quasi-criminal nature, it is, in form at least, a civil action; but on account of its criminal nature the Court will not—if the question, whether there has been a breach, has been tried before a jury—order a new trial unless the very strongest grounds be shown for setting aside the verdict (*Mackenzie*, 1 D. 487). In that case the jury found for the defenders, and the Court were of opinion that they should be treated as if they had tholed an assize. A complaint that an interdict has been broken may, however, be appealed to the House of Lords, who may modify the penalty (*Hamilton*, 10 D. 41, revd. 7 Bell, 272). A breach can be committed not only against a perpetual interdict, but also against an interim interdict (*Robertson*, 7 S. 272), and in that case the interdict does not lose its force although the process falls asleep (*Hamilton*, 2 D. 589).

The procedure when a petition is presented is as follows:—Service of it is made upon the respondent, and he is ordered to appear at the bar. If he fail to appear, an order for his apprehension will be granted (*D. Atholl*, 10 M. 298). When he does appear, if he confess, the case is at once disposed of; but if he deny the averments, a condescendence and answers

will be ordered, without remitting the case to the Lord Ordinary, as the case is an Inner House one (*Ramage*, 6 D. 146). A proof is then taken, or, as above stated, the question may be remitted to a jury.

The first question is whether the interdict has been brought to the knowledge of the respondent. As to this, it is sufficient if a copy of the interlocutor alone, without a copy of the note, has been served on the party whose conduct is complained of. Any person, though neither a messenger nor a notary, may serve it. In fact, all that is required is evidence that the interdict has been made known to the party complained of (L. Mackenzie in *Clark*, 1 D. 970; *Henderson*, 1 R. 920). Now also, an interdict may be intimated by registered letter (45 & 46 Vict. c. 77).

It is scarcely necessary to remark that an interdict only affects the parties named in it. There cannot, for instance, be an interdict against A. B. and all others; and therefore a complaint of breach of interdict against parties not named in the decree is an incompetent proceeding (*Pattison*, 2 S. 536). Again, there may be such a change in the circumstances that existed when the interdict was obtained as not to entitle the person who has obtained it to enforce it. When that is so, the Court will not punish the party interdicted for a breach of it; and, of course, in such cases the party interdicted can apply to the Court to have the interdict recalled, if that course be thought advisable (*Lord Lovat*, 6 M. 330; *Dudgeon*, 4 R. (H. L.) 88). This is perhaps only an example of the general rule that petitions for breach of interdict are strictly read. At the same time, the interdict must be obeyed; and even though the breach is not wilful, it is punished (*D. Atholl*, 2 S. 442; *Walker*, 4 S. 302). Where it is wilful, the punishment may be a fine or imprisonment; and in addition, the Court may ordain the respondent to find security that the offence will not be committed again, failing which it may order an additional period of imprisonment (*Hamilton*, 10 D. 41; *Gray*, 12 D. 85). In an important case a wilful breach was only punished by censure, but that was exceptional (*Clark*, 1 D. 955). When a breach of interdict has been committed, the respondent will be found liable in expenses, and may be ordained to undo any operations he has executed in breach of the interdict (*L. Blantyre*, 7 D. 299). Although the party interdicted is cited to appear at the bar, and must then appear, still it is not absolutely necessary that he should be present when judgment is given, where there is no decerniture for punishment (*Anderson*, 13 D. 405). Even where the punishment is a fine, it is not absolutely necessary (*Hamilton*, 10 D. 41); but of course the presence of the party whose conduct is complained of is absolutely necessary where the sentence is one of imprisonment. In that case, a duplicate copy of the interlocutor, signed by the presiding judge, is a sufficient warrant for the respondent's committal to prison (*Macleod's Trs.*, 10 R. 792.)

Although a petition and complaint is a quasi-criminal proceeding, conclusions for breach of interdict may be conjoined with an application for interdict against other parties in relation to the same subject (*Jolly*, 6 S. 872).

As above stated, if a party considers he should no longer be subject to an interdict, his remedy is to petition the Court for its recall.

[Mackay, *Manual*, 587; Rankine, *Landownership*, 16.] See INTERDICT; CONTEMPT OF COURT.

Breach of the Peace.—This crime is committed when the accused has annoyed and disturbed the lieges, and has broken the peace of the community.

1. *Places where the Offence may be Committed.*—Breach of the peace is usually committed in the public streets. Such an offence is frequently prosecuted under Police Acts, either general or local. But outrageous conduct on the streets is also an offence at common law (*Ainslie*, 1842, 1 Broun 25). The crime may also be committed in the country, as where a crowd of persons enters unlawfully upon a farm and policies in such numbers as to alarm the lieges (*Macbeath*, 1886, 1 White 286; see also *Stevenson*, 1878, 4 Coup. 76). Disorderly conduct at public meetings may amount to breach of the peace (*Sleigh*, 1850, J. Shaw 369; *Hendry*, 1883, 5 Coup. 278; see also *Armour*, 1886, 1 White 58). Disturbance of public worship in church may be punished as a breach of the peace (*Fraser*, 1839, 2 Swin. 436; *Dougal*, 1861, 4 Irv. 101). Formerly, conduct of this description was prosecuted as profanity under 1587, c. 27. In England, disturbance of public worship is a statutory offence under 23 & 24 Vict. c. 32. Breach of the peace may take place even in a private house (*Matthews & Rodden*, 1860, 3 Irv. 570; *Ferguson*, 1889, 2 White 278).

2. *Conduct which amounts to Breach of the Peace.*—In the case of *Ferguson* (*supra*), it was laid down that—"Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges,—not necessarily alarm in the sense of personal fear, but such alarm as causes them to believe that what is being done causes, or will cause, real disturbance to the community, and the breaking up of the peace of the neighbourhood. Where there is brawling, and where offensive language is used, it is not necessary that those who hear it should be alarmed for their personal safety. It is enough if the conduct of those who are found brawling and using the offensive language is such as to excite reasonable apprehension that mischief may ensue to the persons who are misconducting themselves, or to others." Insulting language does not, *per se*, amount to breach of the peace (*Galbraith*, 1856, 2 Irv. 520; *Buist*, 1865, 5 Irv. 210; *Banks*, 1876, 3 Coup. 359; *Marr*, 1878, 4 Coup. 53). But if such language is unduly protracted, or if it is accompanied by threats or violent gestures, or if it is of such a nature as tends to produce a breach of the peace, then a breach of the peace has been committed (*Durrin & Stewart*, 1859, 3 Irv. 341).

The following acts may be punished as breaches of the peace:—Riotous assembling in circumstances which do not amount to mobbing (*M'Cabe*, 1838, 2 Swin. 20; *Duncan*, 1843, 1 Broun, 512; *Currie*, 1864, 4 Irv. 578; *Macdougall*, 1887, 1 White, 328; *Berryglass*, 1888, 1 White, 574); challenging a person to fight (*M'Kechnie*, 1832, Bell's *Notes* 111); fighting or duelling (*Burn* 1842, 1 Broun, 1; *Rodgers*, 1892, 3 White 151); writing and sending a letter threatening harm to person or property (*Hunter*, 1838, 2 Swin. 1); shouting in the streets (*Ritchie*, 1882, 5 Coup. 147); disorderly processions in the streets (*Deakin*, 1882, 5 Coup. 174; *Whitehurch*, 1895, 33 S. L. R. 33); disorderly street-preaching (*Hutton*, 1891, 3 White 41).

3. *Tribunal.*—The crime of breach of the peace is usually prosecuted summarily in Police Courts.

4. *Complaint.*—The following is a form of complaint at common law, for breach of the peace:—"That A. B., painter, number 39 X Street, Edinburgh, on Saturday 11th July 1896, in Y Street, Edinburgh, did conduct himself in a riotous, outrageous, and disorderly manner, shouting, bawling, and swearing, whereby the lieges were annoyed and disturbed, and a breach of the public peace was committed." For the provisions of the Riot Act, see MOBBING (1609, c. 7; 6 Anne, c. 6; Hume, i. 442; Alison, i.

579; Macdonald, 188; Anderson, *Criminal Law*, 52; Chisholm's *Barclay's Digest*, 55). See LAWBURROWS.

Breach of Promise of Marriage.—A promise to marry will not be specifically enforced by the Court, but an action of damages lies against the party who wrongfully fails to implement the contract. Attempts have been made to abolish this right of action, except as limited to the recovery of pecuniary loss, and a resolution to that effect was carried in the House of Commons, May 6, 1879 (*Hansard*, vol. ccxlv. pp. 1867–89). The usual form of issue is: "Whether in or about the month of , 18 , the defender promised and engaged to marry the pursuer, and whether the defender wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer" (*Colvin*, 1890, 18 R. 115). The action is competent at the instance of the man (*Thomson*, 1767, Mor. 13915). But he will rarely get more than nominal damages (see a Sheriff Court case, *Longmore*, Guthrie's *Select Cases*, 2. 450). In addition to claims for money out of pocket and for "loss of the market" (see *Grahame*, 1685, Mor. 8472), it has long been settled that compensation is due as *solatium* for wounded feelings (*Hogg*, 27 May 1812, F. C.). (For the law as to the constitution of marriage by promise *cum copula subsequente*, see MARRIAGE.)

PROMISE.

The promise may be proved by parole, and the parties are competent witnesses (see 37 & 38 Vict. c. 64, s. 1, which repeals sec. 4 of 16 & 17 Vict. c. 20). The promises must be reciprocal. But the promise and acceptance may be inferred from the conduct of the parties, from a course of correspondence, or from statements made to third parties; and where the man's offer or promise is proved, the woman's acceptance will be readily presumed from her conduct (*Hogg*, *ut supra*; *Murray*, 1861, 23 D. 1243; *Honeyman*, 1831, 5 W. & S. 145; *Tucker*, 1846, 9 D. 21; *Hutton*, 3 Salk. 16, 64; Fraser, *H. & W.* i. 496). But the correspondence or other evidence may lead to the inference that the woman never consented, in which case the man could not be guilty of breach (see *Morrison*, 1869, 8 M. 347; *Vineall*, 1865, 4 F. & F. 344). And a mere expression to third parties of a desire or intention to marry a woman, not communicated to her, is not a promise (*Cole*, 1837, 8 C. & P. 75). The promise may be qualified by any reasonable condition, *e.g.* that the marriage is not to take place till the death of the defender's father. And in that case there will be no breach till the condition has been fulfilled, unless before then the defender has declared his intention not to marry the pursuer, or has married another woman (*Cole*, *ut supra*; *Frost*, 1872, L. R. 7 Ex. 111. See *Caines*, 1846, 15 M. & W. 189).

An unconditional promise to marry, means to marry within a reasonable time, looking to the circumstances of each party (Fraser, *H. & W.* i. 489; Bishop, *Marriage & Divorce*, s. i. 188; see *Harrison*, 1699, 1 Ld. Raym. 386; *Potter*, 1815, 1 Stark, 82; *Hall*, 1858, E. B. & E. 746, esp. per Erle, J., at 754; *Short*, 1846, 8 Ad. & Ell. 358).

BREACH.

It is a breach if the defender expressly repudiates the contract, or puts himself in such a position that he cannot fulfil it, *e.g.* by marrying another (*Caines*, *ut supra*). And breach may be inferred from the cessation of inter-

course between the parties, or from other conduct evincing a determination not to fulfil the contract (*Cattenach*, 1864, 2 M. 839; *Currie*, 1874, 12 S. L. R. 75). Where the man wrote to the woman that he had ceased to love her, but would marry her if she liked, an issue was allowed (*Cattenach, ut supra*). And where the circumstances indicate that there has been a breach, an offer in the defences to marry the pursuer may be regarded as coming too late (*ib.*; see *Dennis*, 1871, 24 L. T. 363). But mere rudeness by the defender is not breach, unless the jury think it was intended to make the pursuer give up the contract (*Stoole*, 1870, 8 M. 613).

Defences.

The following are good defences:—1. That there is a legal impediment to the marriage, if both parties knew of it at the date of the promise (*Harrison, ut supra*; *Millward*, 1850, 5 Ex. 775; Fraser, *H. & W.* i. 492).

2. That the pursuer has released the defender from the engagement. Acquiescence in the termination of the contract will be presumed, if intimacy has been broken off, unless the action is brought within a reasonable time (*Colvin*, 1890, 18 R. 115).

3. That the woman has had sexual intercourse with another man since the promise, or before it, if unknown to the defender when he promised. In either case the defence will fail if he forgave her, and did not break off the relation (*Fletcher*, 1878, 6 R. 59; *Irving*, 1824, 1 C. & P. 350; *Bench*, 1844, 1 C. & K. 463; see *Hall*, 1858, E. B. & E. 746; *Voet*, 23. 1. 13; Fraser, *H. & W.* i. 493). And Pothier is probably right in saying that the man would not be held to his contract if the woman were ravished after the promise (*Traité du Contrat de Mariage*, ii. 1. 7). J. Voet (23. 1. 14) expresses a contrary opinion, on the ground that this is to punish the innocent for the fault of the guilty. But the woman cannot found on her own unchastity as an excuse for her failure to implement the contract (Voet, Pothier, Fraser, *l.c.*, and cases cited).

4. That the promise was induced by fraudulent misrepresentation, or concealment of material facts as to the character, position, or previous history of the pursuer (*Wharton*, 1824, 1 C. & P. 529; *Foote*, 1824, 1 C. & P. 545; Fraser, *H. & W.* i. 491). But one who promises marriage is bound to satisfy himself as to the character and suitability of the other party; and a woman to whom an offer is made is not, in general, bound to disclose circumstances which might induce the man to retract it. Even where a woman accepted an offer and concealed the fact that she was engaged to another man, it was held, in England, that she was not barred from insisting in a claim of damages (*Beachey*, 1860, E. B. & E. 796). And in another English case a man was held guilty of breach though his reason was that the woman had been of unsound mind and confined in a lunatic asylum, a fact of which he was ignorant at the time of the promise (*Baker*, 1861, 10 C. B., N. S. 124). The soundness of both these decisions, but especially of the latter, may well be doubted (see Fraser, *H. & W.* i. 481; Bishop, *Marriage & Divorce*, i. s. 221).

It would probably entitle the man to resile if he discovered that the woman had previously been married and concealed that fact (see *dicta* in *Beachey, ut sup.* But see Voet, 23. 1. 14).

5. The discovery, after the promise, that either party is incapable of sexual connection, would entitle the other party to resile. For it would be absurd to compel a marriage to be entered into which the defender could thereupon cause to be declared null. So in an American case it was held a valid defence that the woman was unable to have sexual intercourse, and

refused to submit to a surgical operation, although she had promised to do so (*Gring*, 1886, 56 Amer. R. 314).

6. The pursuer's character may be proved to have become so bad that the defender will be excused for breaking off the contract (*Baddeley*, 1816, 1 Holt, 151). In *Thomson*, 1767, Mor. 13915, the woman had an *embarras des richesses* of such defences. And so where the man had conducted himself in a violent and brutal manner, and threatened to use her ill, it was said by L. Ellenborough that the woman had a right to say she would not commit her happiness to such keeping (*Leeds*, 1803, 4 Esp. 255). But mere rudeness is not sufficient justification (*Stoole*, 1870, 8 M. 613). And it is possible there may be other changes of circumstances, such as the pursuer having become paralytic or a leper, which would be a legal answer to the action (see Pothier, *Traité du Contrat de Mariage*, 2. 1. 7. 60; *Atchinson*, 1797, Peak. Add. Ca. 103). Pothier's statement is that the one party is always freed from the engagement when anything has happened to the other party which, if the former had foreseen it, would certainly have prevented his making the promise. This is undoubtedly too wide (see *Hall*, *ut supra*; *Beachey*, *ut supra*). The tendency of the cases is against admitting new defences as absolute, and in favour of leaving the jury to judge of their effect upon damages (see *Hall*, *ut supra*; *Beachey*, *ut supra*; and see next paragraph).

Can the Defender Found on his own Inability to Fulfil the Contract?—It is clear that he cannot found on his own fraud. And consequently a married man may be sued for breach if the fact of his marriage was unknown to the pursuer at the promise (*Millward*, 1850, 5 Ex. 775). There is more difficulty where the defender's defence is that his own health has become such as to render him unfit to marry. In *Hall's* case (E. B. & E. 746), the man's defence was that he was in an advanced stage of consumption, and could not marry without danger to life. In the Queen's Bench the Court was equally divided, and in the Exchequer Chamber, by a majority of one, the defence was held insufficient. But to some extent the fact was founded on that the defendant had allowed the plaintiff to go on with her action, without giving her notice of the nature of his defence. The judgment is doubted by L. Fraser, *H. & W.* i. 491; Sir F. Pollock, *Contracts*, 6th ed., 407; and Bishop, *Marriage & Divorce*, i. s. 219. It is supported by Montague Smith, J., in *Boast*, 1868, L. R. 4 C. P. at p. 8. If the question arose in Scotland, it is thought *Hall's* case would not be followed. It seems unsound to argue that the man was not disabled from following the contract because it was in his power to give the woman the status of his wife. It is submitted that the law is correctly stated in an American case: "If either party should, after the promise, become by the act of God, and without fault on his own part, unfit for the relation of marriage, and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so" (*Allen*, 1882, 41 Amer. R. 444).

Does the Right of Action Transmit to or against Executors?—It is settled in England that an action for breach of promise of marriage is one of those which fall within the rule *actio personalis moritur cum persona*. It cannot be brought by the executors of the person to whom the promise was made, except to the extent to which the deceased sustained special damage, *i.e.* temporal loss flowing directly from the breach, nor against the executors of the promisor, except to the extent of such special damage (*Chamberlain*, 1814, 2 M. & S. 408; *Finlay*, 1887, 20 Q. B. D. 494).

The same rule seems to be followed in America (Bishop, *Marriage & Divorce*, s. 194); and it is thought that it would be adopted in Scotland, at least as regards the right of the executor to sue (Fraser, *H. & W.* i. 488; see *Bern*, 1893, 20 R. 859). Even where a deceased person has suffered actual pecuniary loss, and has died without raising the action, or intimating an intention so to do, the title of his or her executors to sue it is open to grave objection. Many excellent and creditable reasons may have weighed with the deceased in refraining from bringing the action (see per L. M'Laren in *Bern, supra*, 863). But it is probable that an executor would be found entitled to carry on such an action if the pursuer died during its dependence (*Neilson*, 1853, 16 D. 325; *Darling*, 1892, 19 R. (H. L.) 31). In England the action does not lie against the executors of the promisor, except to the extent stated (*Findlay, ut supra*). But this rule would, it seems, not be followed in Scotland (*Evans*, 1885, 12 R. 1295).

Amount of Damages.

The amount of damages in actions of this kind is eminently a question for the jury, and the Court will be very slow to interfere with their award (Sedgwick on *Damages*, 7th ed., 11. 449; *Smith*, 1857, 1 C. B., N. S. 660; *Berry*, 1866, L. R. 1 C. P. 331; Bishop, *Marriage & Divorce*, i. s. 226; but see Fraser, *H. & W.* i. 496).

Evidence as to the defender's means is admissible (*Smith, Berry, ut supra*).

In a recent case opposite views were expressed, by L. Young and L. Trayner, as to whether the pursuer was entitled to a diligence to recover the defender's books in order to ascertain his financial position (*Somerville*, 1896, 33 S. L. R., 411). An action for breach of promise will be sent to a jury, unless special cause is shown why this should not be done (Evidence Act, 1866 (29 & 30 Vict. c. 112), s. 2; see *Trotter*, 1888, 16 R. 141).

[See Ersk. i. 6. 3; Bell, *Prin.* 1508, 2033; Fraser, *H. & W.* i. 484; Voet, 23. 1. 13; Pothier, *Traité du Contrat de Mariage*, Part II. ch. i. art. 7; Bishop, *Marriage & Divorce*, s. 182; Walton, *H. & W.* 285.]

See Seduction; Marriage.

Breach of Trust and Embezzlement.—Prior to 1887, it was of the utmost moment to determine whether a certain crime was a theft or was a breach of trust. Under the form of indictment which was in vogue prior to that year, if the crime libelled was theft, and the facts proved in evidence showed that the accused had been guilty of breach of trust and embezzlement, no conviction could follow. The same result followed in the converse case of an indictment for breach of trust and embezzlement and evidence that the crime committed was theft. Since 1887, however, the distinction between these crimes has become of less importance, because, by sec. 59 of the Criminal Procedure Act of that year, it is provided that, under an indictment for breach of trust and embezzlement, a person accused may be convicted of reset or of theft, and, under an indictment for theft, a person accused may be convicted of breach of trust and embezzlement. The same Statute further provides (s. 63) that it is competent to libel, as an aggravation of breach of trust and embezzlement, a previous conviction of any crime inferring dishonesty.

As, however, theft is a crime of a graver nature than breach of trust and embezzlement, and is more severely punished, it is still of importance to differentiate facts indicating the former from those which indicate the latter offence. The two crimes may be thus distinguished. In the case of theft,

there is felonious appropriation by a person who has received merely the custody of property for a limited specific purpose, the property, as a rule, to be returned *in formâ specificâ*. The usual instances are brokers, other than pawnbrokers, shopmen, messengers, workmen engaged to repair articles, paupers pawning the poorhouse clothes, servants selling their livery. In the case of breach of trust and embezzlement, there is felonious appropriation by a person who has received—(1) a limited ownership of property, subject to restoration at a future time; or (2) possession of property, subject to liability to account for it to the owner.

1. *Duty to Account.*—It is breach of trust and embezzlement if there is a duty to account for an amount, as distinguished from a duty to hand over certain specific notes, or certain gold, silver, or copper coins. Thus, if a trustee or executor, factor for collecting rents, treasurer of a society, or a public official, appropriate funds under their charge, the crime is breach of trust and embezzlement (*M'Kinlay*, 1836, 1 Swin. 304; *Reeves*, 1843, 1 Broun, 612; *Campbell*, 1845, 2 Broun, 412; *Duncan*, 1849, J. Shaw, 270; *Crossgrave*, 1850, J. Shaw, 301; *M'Leod*, 1858, 3 Irv. 79; *Macdonald*, 1860, 3 Irv. 540; *Lawrence*, 1872, 2 Coup. 168; *Keith*, 1875, 3 Coup. 125; *Lee*, 1884, 5 Coup. 492).

2. *Agency.*—If the property is given on a footing of agency, or with a power of administration, and is appropriated, the crime is breach of trust and embezzlement: as when a person appropriates a sum of money given to him for the purpose of paying accounts, or when a bank agent, who knows he has no money at his credit, uses his position to obtain an overdraft, or when directors of a bank fraudulently put the funds of depositors to a wrong use (*Climie*, 1838, Swin. 118; *City Bank Directors*, 1879, 4 Coup. 161; *Scott*, 1879, 4 Coup. 227; *Elder*, 1879, 4 Coup. 530; *Fleming*, 1885, 5 Coup. 552).

Indictment.—The Act of 1887, sch. A, gives the following forms:—

(1.) ". . . You did, while in the employment of James Pentland, accountant in Frederick Street, Edinburgh, embezzle forty pounds fifteen shillings of money. . . ."

(2.) ". . . You did, while acting as commercial traveller to Brown & Company, merchants in Leith, at the times and places specified in the inventory hereto subjoined, receive from the persons therein set forth the respective sums of money therein specified, for the said Brown & Company, and did embezzle the same (*or*, did embezzle forty-seven pounds of money, being part thereof) . . ."

Punishment.—Penal servitude or imprisonment.

[Hume, i. 61; Alison, i. 356; More, ii. 388; Macdonald, 58; Anderson, *Criminal Law*, 116.]

Breaking Bulk.—A buyer or consignee of goods breaks bulk, when on delivery to him he opens any packet or case in which the goods are contained, or separates part from the whole, or otherwise interferes with the state or condition of the goods. In the general case, breaking bulk implies an election by a buyer to accept goods which he might otherwise have rejected. It is an act of ownership on his part, which precludes him from afterwards rejecting the goods as disconform to contract. But the buyer must have "a reasonable opportunity of examining the goods, for the purpose of ascertaining whether they are in conformity with the contract" (Sale of Goods Act, 1893, s. 34), and if breaking bulk is necessary for such examination it will not of itself infer an acceptance. "A tender of goods

does not mean a delivery or offer of packages containing them, but an offer of those packages, under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained" (per Parke, B., in *Isherwood*, 1843 (11 M. & W.), 347 at 350). The effect of breaking bulk after delivery in sale is illustrated by *Wallace*, 1885 (22 S. L. R. 830). A claim against a carrier for damages sustained to goods in the course of the transit, is not barred by the consignee having broken bulk, but if the consignee has reason to suspect damage he should give such notice to the carrier as will enable him to check the state of the goods on their arrival. Breaking bulk in such circumstances without notice to the carrier will be an element to be considered in weighing the evidence (*Johnston*, 1875, 2 R. 202). In the criminal law of England breaking bulk was formerly of importance as distinguishing larceny from a minor offence, in the case of a bailee who appropriated goods entrusted to his care. A bailee had a special property in goods, though he had not the ownership or general property. He held them with consent of the owner, and the offence was therefore treated as breach of trust and not as theft. But if the bailee broke bulk, *e.g.* "if a carrier opened a bale or pack of goods, and took away part thereof, he was guilty of larceny, for by this tortious act the contract of bailment was determined" (Archbold's *Criminal Law*, 9th ed. 192). In this sense breaking bulk is now immaterial, the general law having been altered in 1857 so as to render any bailee, who fraudulently misappropriates goods, guilty of larceny whether he has broken bulk or not (20 & 21 Vict. c. 54, s. 4; see also the Larceny Act 1861, 24 & 25 Vict. c. 96, s. 3). See SALE.

Breaking Enclosures.—A statutory offence created by several old Scots Acts, anent the planting and enclosing of ground, the most important of which are 1661, c. 39; 1661, c. 41; 1685, c. 39; and 1686, c. 11. These Acts provide for the punishment of those who destroy plantings or enclosures, or who allow their cattle to do so.

The first Act, 1661, c. 39, is general, and directs justices to enforce the older laws for the protection and encouragement of planting and enclosing, and gives power to inflict pecuniary penalties for the punishment of those who destroy such plantations and enclosures.

The Act 1661, c. 41, which re-enacts the previous law on the subject, provides that every "heritor, liferenter, and wadsetter" shall enclose certain tracts of land, according to the amount of his "yearly valued rent." Pecuniary penalties are fixed for breaking into such enclosures, and "heritors, tenants, and cottars" are ordained, under pecuniary penalties, to keep their "cattel and goods" out of such enclosures.

The Act 1685, c. 39, re-enacts the last-mentioned Act, and specifies the penalties for cutting, breaking, pulling-up, or peeling the bark of any tree under ten years old, as ten pounds Scots, and twenty pounds Scots if the tree be over ten years. The fine for permitting cattle or sheep to break through an enclosure is fixed at ten pounds Scots.

The last of the principal Acts dealing with this subject is the Act 1686, c. 11, known as the Winter Herding Act. It ordains "all heritors, liferenters, tenants, cottars, and other possessors of lands or houses" to herd their horses and cattle, so that they may not break through any neighbour's enclosures. In the event of cattle breaking through a neighbour's enclosure, the owner of the cattle is subjected in payment, to the person

suffering, of half a merk *toties quoties* for each cow, horse, or sheep, in addition to payment of the damage done to the grass or plantation; and it is declared lawful to the possessor of the ground to detain the whole till he be paid off the said half merk for each, and the expense of their maintenance.

These Statutes regarding enclosures and the protection of fences, may be executed by Sheriffs and other judges, and also by justices of the peace; but they have now fallen into desuetude, and, in all probability, offences under them at the present day would be prosecuted as malicious mischief (*Buchanan*, 1784, Mor. 10497; *Govan*, 1794, Mor. 10499; *Loch*, 1799, Mor. 10501, and other cases in Mor. App. "Planting and Enclosing").—[Hume, i. 122–3; Ersk. iv. 4. s. 39; Macdonald, *Criminal Law*, 3rd ed., 115; Alison, i. 448.]

Breaking of Prison.—See Prison-Breaking.

Brevi manu traditio.—In Roman law, if the buyer had already actual physical control of the thing sold—as where, for example, he had previously hired it—a mere declaration on the part of the seller that the buyer should henceforth hold the thing as owner, operated as a *traditio* or delivery of the thing. This is commonly known as "*brevi manu traditio.*" The change in the *animus* of the parties, in other words, transformed in such a case the buyer's *detentio* into *possessio* (*Dig.* 18. 1. 74; 41. 1. 9. 6). So when it was intended that the seller of an article should retain the liferent of it, his holding of the article upon the title of liferent was construed as in effect a delivery to the purchaser (*Cod.* viii. 54. 28). The relation of the different kinds of delivery recognised in Roman law to the analogous distinctions existing in the law of Scotland, is fully discussed in M. P. Brown on *Sale*, 390 *et seq.* See also Bell, *Com.* i. 189; *Gibson*, 1833, 11 S. 916.

Brewing.—There was at one time a doubt as to whether a vassal had a right to brew on his property without a special grant or clause in the charter in his favour from the superior, and clauses conferring a right to brew were sometimes inserted in old charters. In 1681 it was decided that a vassal had a right to brew though not infeft *cum bruariis* (*Nisbet*, Mor. 15007). Brewing has been carried on in Scotland for many centuries. Beer is mentioned in an Act of James III., 1482, and in many later Acts of the Scots Parliament. Malt duty, which was first levied in England in 1644, was not imposed in Scotland till 1713, when it met with much opposition. Payment was refused, the Excise officers were resisted, and serious riots followed. The result was that till 1819 the malt duty was levied in Scotland at a lower rate than in England. There are many Acts of Parliament regulating the manufacture of beer, and imposing various taxes on brewers. But the leading enactment now in force is the Inland Revenue Act of 1880 (43 & 44 Vict. c. 20), which repealed almost all the earlier Acts dealing with the subject. That Act abolished the duty on malt, and substituted for it an Excise duty, to be paid by brewers on the beer brewed by them. For the purposes of the Act brewers are divided into two classes: (1) brewers for sale, who require an annual licence at the rate of £1: (2) brewers not for sale, who require a licence at the rate

of 4s. per annum. The penalty for brewing without a licence is £100, and forfeiture of beer, materials, and utensils. The beer duty now payable by brewers is at the rate of 6s. 9d. on every 36 gallons of worts of a certain specific gravity. Brewers not for sale, who occupy houses exceeding £15 annual value, and farmers occupying houses exceeding £10 annual value, who brew for their labourers, pay the same beer duty as brewers for sale. Persons occupying houses of less value, who brew solely for their own domestic use, do not pay beer duty, and the price of the licence which they are required to take varies. There are numerous provisions in the Act (1) as to inspection of premises and vessels by Excise officers before any person commences the business of brewing, (2) as to the keeping of a brewing-book by the brewer, in which he must enter, twenty-four hours before the brewing begins, particulars as to the quantity of materials to be used, the exact time of commencing the brewing, etc.; (3) as to the duties and powers of Excise officers to inspect breweries; and (4) as to the mode of working. The Act also contains regulations applying to brewers not for sale. Since 1880 the following Acts, containing provisions defining or regulating brewing, or imposing additional taxation on brewers, have been passed:—44 Vict. c. 12; 48 & 49 Vict. c. 51; 51 Vict. c. 8; 52 Vict. c. 7; 52 & 53 Vict. c. 42; 57 & 58 Vict. c. 30; 58 Vict. c. 16. Beer, as defined by these Acts, includes ale, porter, spruce and black beer, Berlin white beer, and any liquor made or sold as a substitute for beer which contains more than 2 per cent. of proof spirits. 48 & 49 Vict. c. 51 contains a prohibition against adulteration of beer by brewers and others. It has been held that to mix weak with strong beer is adulteration in the sense of this Act (*Crofts*, 1887, L. R. 19 Q. B. D. 524; but this was a case of adulteration by a retailer not a brewer).

[Craig, *Jus Feudale*, ii. Dieg. 8, s. 25; Bankt. i. 592; Stair, Bk. ii. tit. 3 s. 72; Ersk. Bk. ii. tit. 6, s. 8.] See Excise; Public House Statutes.

Bribery.—The offence of bribery consists in the taking a reward by a person, or the giving or offering a reward to a person, to influence his behaviour in his office. Bribery is criminal when the person influenced, or attempted to be influenced, occupies a responsible public office, and the object of the bribery is to influence him in his official capacity.

I. Judges.—1. *Statutory Offence—Taking Bribes.*—The offence of taking bribes by *the judges of the Court of Session* was dealt with by the Act 1579, c. 93, which enacted "that nane of the Lordes of Session alreddie received, or to be received, nouther be themselves, or be their wives, or servands, take in ony times cumming bud, bribes, gudes or geir, fra quhatsumever person or persones presently havand, or that hereafter sall happen to have ony actions or causes persewed before them, outher fra the persewer or defender, under the pain of confiscation of all their movabil gudis, that dois in the contrair, the ane half thereof to be applied to our Sovereign Lord, and the uther halfe to the reveiler and tryer of the saidis bud-takeris. And farther decernis and ordainis the saidis bud-takeris to be displaced and deprived *simpliciter* of their offices, quhilk they beare in the College of Justice, and to be declared infamous, and als to be punished in their persones at the King's Majestie's will." Judges of the Court of Session now hold office *ad vitam aut culpam*, and cannot be removed by the Crown. It is thought, therefore, that impeachment in Parliament is the proper mode of dealing with an act of malversation by a Supreme Court judge (L. Deas in *Stirling*, 1873, 11 M. 480; Mackay, *Practice*, i. 100).

The offence of bribe-taking by *inferior judges* is dealt with by the Acts 1424, c. 45; 1427, c. 107; 1449, c. 17; 1457, c. 76; 1469, c. 26; 1540, c. 104. These Statutes either make particular mention of bribery, or deal generally with malversation or corruption on the part of judges. They "appear to have passed, like those on many other subjects, without much regard to their consistency with each other: and, on a review of the whole series, the result seems to be that bribery is subject to a discretionary censure, including, among other penalties, the loss of fame and office, besides payment of the party's costs, and reparation of his damage" (Hume, i. 407).

2. *Common Law Offence—Giving or Offering Bribes.*—To give or offer a bribe to a judge is a serious offence at common law, and would render the offender liable to an arbitrary sentence of a severe character.

II. OTHER PUBLIC OFFICIALS.—It is a common law offence for public officials to take bribes to influence their public conduct. It is a similar offence to give or offer a bribe, with the like object, to a public official. Thus for an inferior officer of Court, such as a clerk or a macer, to take a bribe, or for any one to give or offer a bribe to such official, is an offence cognizable at common law. It is a common law offence to bribe a parliamentary voter (*Macdonald & Dempster*, 1786, Hume, i. 408), or to attempt to bribe an officer of the revenue (*James Stein*, 1786, Hume, i. 408). In certain departments of the public service the offence of bribery is dealt with by statutory enactment. Thus the Act 7 & 8 Geo. IV. c. 53, s. 12, provides that officials employed in the Excise, who shall take money or reward, or enter into any collusive agreement contrary to their duty, shall be subject to a fine of £500 for every such offence, and, on conviction thereof, shall thereby be rendered incapable of thereafter serving the Crown in any office or employment whatsoever. The same section provides that every person offering such reward, or proposing such agreement to an Excise official, shall, for each offence, be liable to a fine of £500. By the Customs Laws Consolidation Act of 1876 (39 & 40 Vict. c. 36, s. 217), it is provided that if any officer of Customs, or other person duly employed for the prevention of smuggling, shall take any bribe, gratuity, recompense, or reward for the neglect or non-performance of his duty, every such officer, or other person, shall forfeit for every such offence the sum of £500, and be rendered incapable of serving Her Majesty in any office, either civil, naval, or military. By the same section it is provided that "every person who shall give, or offer, or promise to give or procure to be given, any bribe, recompense, or reward to, or shall make any collusive agreement with, any such officer or person as aforesaid, to induce him in any way to neglect his duty, or to do, conceal, or connive at any act whereby any of the provisions of any Act of Parliament relating to the Customs may be evaded, shall forfeit the sum of £200." In 1889 the Public Bodies Corrupt Practices Act (52 & 53 Vict. c. 69) was passed "for the more effectual prevention and punishment of bribery and corruption of and by members, officers, or servants of Corporations, Councils, Boards, Commissions, or other public bodies." By this Statute it is provided (ss. 1 and 2) that any person who by himself, or with another, corruptly *solicits, receives, or agrees to receive* for himself or another, any gift, loan, fee, reward, or advantage as an inducement to, or reward for, or otherwise on account of, any member, officer, or servant of a public body doing, or forbearing to do, anything in respect of any matter or transaction, actual or proposed, in which such public body is concerned, or corruptly *gives, promises, or offers* any gift, etc. to any person, whether for his or another's benefit, as an

inducement to, or reward for, or otherwise on account of any member, officer, etc., doing, or forbearing from doing, anything in respect of any matter or transaction, actual or proposed, in which such public body is concerned, is liable to fine and imprisonment, not exceeding two years, with or without hard labour, and to other penalties specified in the Act. The Statute defines (s. 7) "public body" as meaning "any council of a county, or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under, and for the purposes of any Act relating to local government, or the public health, or to poor law, or otherwise to administer money raised by rates in pursuance of any general Act, but does not include any public body, as above defined, existing elsewhere than in the United Kingdom." In the same section "advantage" is held to include "any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, and also includes any promise, or procurement of, or agreement, or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as above defined."—[Hume, i. 407; Bankt. ii. 480; Kames, *Statute Law Abridgment, h.t.*; Macdonald, 213; see also Bell, *Prin.* s. 37. For the law of England as to bribery, which is very much akin to that of Scotland, see Tomlins, *Law Dictionary, h.t.*; Stephen, *Com.*, 12th ed., iv. 249.]

For the statutory offence of bribery at parliamentary and municipal elections, see Corrupt and Illegal Practices at Elections.

Bridges.—See Roads and Bridges.

Brieve.—A brieve is a writ which is, as the names implies, short and compendious in its terms. It is issued from Chancery in name of the Sovereign, and is addressed to an inferior judge directing him to make trial by a jury of the questions stated in the brieve. Procedure by brieve was introduced into Scotland by James I. upon the model of the system in vogue in England, with which he had become acquainted during his captivity in that country. The chief classes of brieves were the *breve de recto*, whereby the right of property, and the *breve de nova dissasina*, whereby the right of possession, were determined. Upon the institution of the Court of Session, brieves went to a large extent out of use, being superseded by summonses "in the styles accustomed by the Writers to the Signet, and, sustained by the Lords, directed to Sheriffs in that part, having a blank for inserting the name of any person the pursuer pleased, who thereby was substituted in place of the Sheriff" (Stair, iv. 3. 4). The brieves which remained in use after the general adoption of procedure by summons were those of (1) mort ancestry or service; (2) tutory; (3) idiotry and furiosity; (4) teree; (5) division; (6) lining; and (7) perambulation. Of these the first three were retourable, *i.e.* required an answer to be returned to Chancery for the purpose of being registered there with a view to an extract being given out; the others did not require to be retoured. Procedure by brieve has now fallen for the most part into desuetude, but it is still occasionally resorted to (see Skene, *De verborum Significatione*, p. 22; Stair, iv. 3. 4 *et seq.*; Ersk. iv. 1. 3.; Bank, ii. 554; Kames, *Stat. Law Abrid. h.t.*; Mackay, *Pract.* i. 267).

Brieve of Service.—The procedure in the service of heirs was formerly

initiated by a brieve directed to any Judge Ordinary, if the application was for general service, or to the Sheriff of the county within which the lands lay, if the application was for special service. The subjects of inquest were the claimant's propinquity to the deceased, and, in the case of special service, various particulars regarding the tenure of the lands. The jury served the heir, and the judge returned the service to Chancery, an extract from which was the evidence of the heir's right. Procedure by brieve of service ceased at the passing of the Service of Heirs Act, 1847 (10 & 11 Vict. c. 47), and has been superseded by petition in manner now prescribed by the the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 27 *et seq.*). The older procedure by brieve is more fully described under the head of SERVICE (*q.v.*).

Brieve of Tutory.—This is a rare but still competent form of process. Failing testamentary tutors, the nearest agnate may apply to be appointed to the office of tutor at law. A brieve is issued, addressed to any judge having jurisdiction, requiring him to call a jury to ascertain (1) who is the nearest male agnate of the age of 25 entitled to succeed to the pupil: (2) whether he is attentive to his own affairs; (3) whether he can give security; and (4) who is the nearest cognate of the ward, for the person of the pupil is intrusted to the latter, the nearest agnate having control only of the estate. In practice, the jury makes inquiry only into the first head of the inquest, the agnate's fitness for the office being presumed until the contrary is proved, his sufficiency being matter for the clerk, and the last head being left to the decision, in case of dispute, of the ordinary courts of law. The brieve is executed on a fifteen days' *inducie* at the market cross of the head burgh of the judge's territory, and after the inquest is made, and the verdict is retoured to Chancery, a letter of tutory is expede under the quarter seal, and issued to the tutor upon his finding caution and taking the oath *de fideli*. This procedure is now almost entirely superseded by that of appointing a factor *loco tutoris* under the Pupils' Protection Act, 1849 (Stair, iv. 3. 6; Ersk. i. 7. 6; Fraser, *P. and C.* 186: *Juridical Styles*, iii. 233).

Brieves of Idiotry and Furiosity—Brieve of Cognition.—Prior to the Court of Session Act, 1868, the fact of insanity might be established by brieve from Chancery in the old form directed to the Judge Ordinary of the territory within which the person said to be fatuous or furious resided. He required to be made a party to the brieve, having a good interest to oppose it, if of sound mind, and his person had to be exhibited at the inquest, so that the jury might have an opportunity of forming an opinion as to his state of mind by conversation with him. If that was omitted, the verdict was reducible (*Dewar*, 25 Feb. 1809, F. C.). It was the duty of the jury to determine (1) whether the insanity existed, and if so, from what time, for by 1475, c. 66, no alienation made by an insane person after the commencement of his disorder was valid; and (2) who was the nearest male agnate of the age of 25. The curatory of furious persons belonged originally to the Crown, as the king alone had the power of coercing by chains and fetters (Craig, 2. 20. 9). This was, however, abolished by 1585, c. 18, which gave the office to the next agnate, as in the case of persons merely fatuous. The nearest cognate was entitled to the custody of the person as in the case of pupils. Brieves of idiotry and furiosity were similar in their terms, except that in the former the inquest was *Si sit incompos mentis, fatuus et naturaliter idiota*; and in the latter, *Si sit incompos mentis, prodigus et furiosus, viz., quod neque tempus neque modum impensarum habet sed bona et possessiones dilacerandas et dissipandas profundit.* Where there was any doubt whether the condition alleged was idiocy

or furiosity, brieves of both kinds might be taken out, and only that which was established by the inquest was retoured to Chancery (*Stark*, 1746, M. 6291). Where an insane person was cognosced, and the nearest male agnate declined to serve, the Court of Session, as coming in place of the Court of Exchequer, might appoint a tutor dative (19 & 20 Vict. c. 56, s. 19). Such appointments were very rare, the practice being to apply for a *curator bonis* if the next agnate declined office (*Bryce*, 1828, 6 S. 425, 3 *W. and S.* 323).

The procedure in the cognition of insane persons is now regulated by the Court of Session Act, 1868, s. 101, and A. S., 3rd December 1868. The Statute provides: "It shall no longer be competent to direct a brieve for the cognition of a person alleged to be *incompos mentis prodigus et furiosus*, or of a person alleged to be *incompos mentis fatuus et naturaliter idiota*, to the Judge Ordinary; and the brieves of furiosity and idiotry hitherto in use are hereby abolished; and in lieu thereof, it is enacted that a brieve from Chancery, written in the English language, shall be directed to the Lord President of the Court of Session, directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age; and such person shall be deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs; and such brieves shall be served upon the persons sought to be cognosced on induciæ of fourteen days; and the brieve shall be tried before the said Lord President and a special jury, or before any other judge of the Court of Session to whom the said Lord President may remit the same, and a special jury; and the trial shall be conducted in the same manner as jury trials in civil causes in Scotland are conducted, with all the like remedies as to motions for new trials and bills of exceptions, which are competent with reference to such jury trials; and the Court shall have power to award expenses against either party; but they shall not award expenses against the party prosecuting the brieve, unless they are of opinion that the same was prosecuted without reasonable or probable cause; and the verdict and service of the jury shall be retoured to Chancery, and shall, unless set aside on any ground, have the like force and effect, and be followed by the like procedure, as a retour of the verdict and service of the jury before the Judge Ordinary according to the present law and practice."

The Act of Sederunt provides that when a brieve from Chancery, under the provisions of the Act, is presented to the Lord President, he is to issue a precept to messengers-at-arms, commanding them to summon the person sought to be cognosced to compear at a time and place to be specified, being not less than fourteen days from the date of service, to hear and see the matter of the brieve duly cognosced and determined. The person presenting the brieve must also, within the fourteen days, give public notice of the brieve and precept, once in the *Edinburgh Gazette*, and by advertisement twice at least in a newspaper published within the county—or if there be none such, in the county next adjoining to that—in which the person sought to be cognosced resides. No further or other service or publication of the brieve is necessary, either at the market cross of the head burgh of the county within which the person sought to be cognosced resides, or otherwise. At the time and place specified in the precept, the Lord President, after hearing parties, appoints the person claiming the office of curator to lodge his claim to the office within a certain specified time, and the person sought to be cognosced, or those acting on his behalf, to answer the claim within a specified time thereafter, the claim and answers being prepared in the form of a condescendence and answers, and stating all

facts necessary to be disclosed in order to prevent surprise. The Lord President then fixes the time and place for the trial of the brieve, and gives such directions as may be necessary to secure the presence of the person sought to be cognosced before the jury. The order of the Lord President fixing the time and place of trial, or a certified copy, is sufficient warrant to the Sheriff of the county of Edinburgh, or to the Sheriff of the county within which the trial is appointed to take place, to summon a special jury in common form. The reducing of the jury to twenty, and the calling and balloting of the special jury at the trial, are conducted according to the ordinary rules in the trial of civil causes in the Court of Session. The number of jurors empanelled to try the brieve is twelve, and they return their verdict either unanimously or by such majority, and under such conditions, as are provided in the case of verdicts returned by juries in the trial of civil causes in the Court of Session. The trial may be postponed, on cause shown, on such conditions regarding expenses as may seem just. When the jury return their verdict, affirming the whole heads of the brieve, it is noted generally 'Cognosce'; but when the jury do not affirm the whole heads of the brieve, the verdict is noted generally 'Not cognosce,' unless there be any special finding regarding the person claiming in the character of nearest agnate (in which case the clerk makes such note as the presiding judge may direct), and the jury is then discharged. It is the duty of the clerk thereafter to make out and subscribe a formal writing, embodying the verdict, and answering the different heads of the brieve, which is retoured to Chancery, if the several heads of the brieve are affirmed, but not otherwise. If the whole heads of the brieve are not affirmed by the jury in favour of the person claiming as nearest agnate, then the formal writing made out and subscribed by the clerk bears that the brieve and claim are not proven, and that the claim is therefore dismissed by the jury, which formal writing is recorded in the books of sederunt.

In other respects the trial is conducted in manner similar to that followed in civil jury trials in the Court of Session. The retour is transmitted to Chancery by the clerk. Any near relation may purchase the brieve, but the jury should find who is the nearest agnate. The latter may come forward after the brieve has been retoured to Chancery and claim the office, but if he does not, the Court may appoint a tutor dative, or a petition may be presented for appointment of a *curator bonis* (*Larkin*, 1874, 2 R. 170). When the Court is satisfied, by the production of medical certificates, that insanity exists, and that steps ought to be taken for the protection of the estate, it may appoint a *curator bonis* without waiting for the verdict of an inquest under a brieve of cognition, even although that may be demanded by the alleged lunatic (*A. B.* v. *C. B.*, 1890, 18 R. 90; 1891, 18 R. (H. L.) 41). See CURATOR BONIS.—[Mackay, *Practice*, ii. 300, *Manual*, 500; Shand, *Practice*, 1007; Ersk. i. 7. 49; Stair, iv. 3. 7.]

Brieve of Terce.—Under this process the widow of a man who dies infeft in heritage may establish judicially her right to a liferent of one-third thereof. The brieve is directed to the Sheriff of the county within which the lands lie, or to the Sheriff of Edinburgh, if they are in more than one shire. Service, or an equivalent, is probably necessary in order that the right may vest (see Walton, *H. & W.* p. 215), but after the widow has served she acquires a *pro indiviso* right with the heir to the possession of one-third of the property or to one-third of the rents. It is the duty of the inquest to inquire whether the claimant was the lawful wife of the deceased, but they are bound to conclude this in her favour, for the purposes of the inquest, if she was holden and reputed as his lawful wife during his life-

time (1503, c. 77; *Craik*, 1891, 19 R. 339). They must also inquire whether the husband died vest as of fee in the lands, and this is proved by production of his infeftments. The jury then serve and cognosce the widow to a just and reasonable terce of the lands, which she may either crave to be "kenned," *i.e.* divided from the two-thirds belonging to the heir, or she may content herself with a third of the rents until a division is made (see KENNING). Procedure by brieve is now very rarely resorted to, but it was adopted in the recent case of *Craik, supra*. The rights of the heir and widow are usually settled extra-judicially, either amicably or by arbitration, and declarator is also competent.—[See Stair, iv. 3. 11; Ersk. ii. 9. 50; M'Laren, *Wills and Succession*, 112; Fraser, *H. & W.* 1101; Walton, *H. & W.* 214.]

Brieve of Division.—This was used for the purpose of settling the rights of heirs portioners, or of adjudgers who had attached the same property and were entitled to rank *pari passu*, or of several widows with separate rights to terce over the same lands, and in general, of all persons jointly interested in the division of heritable property. The brieve was directed to the Sheriff of the county where the lands lay, and was proclaimed at the market cross. A jury of fifteen, sitting under the Sheriff, valued and divided the subjects with the assistance of land surveyors and valuators, and the shares falling to each claimant were then determined by lot, the division being fixed by the decree. The brieve of division has for long been superseded by action of declarator, the last reported instance of its use being in *M'Neight*, 1843, 6 D. 128.—[See Stair, iv. 3. 12; Bell, *Prin.* 1081; Mackay, *Practice*, i. 268, *Manual*, 68; Shand, *Practice*, ii. 605.]

The brieves of *lining* and *perambulation* have also fallen completely into disuse. The former were used for the purpose of settling the boundaries of burghal tenements, and the latter for fixing the marches of other lands. Their place has been taken by actions of declarator.—[See Stair, iv. 3. 13, 14; Ersk. iv. i. 48.]

Review in procedure by Brieve.—In petitions for service, which have now taken the place of brieves, appeal may be taken to the Court of Session, either for jury trial (31 & 32 Vict. c. 101, s. 41) or for review of the Sheriff's judgment when he refuses to serve, or repels objections of an opposing party (s. 42). In cases in which procedure by brieve is still competent, appeal may be taken to the Court of Session at any time before the verdict is pronounced, or possibly before extract (*Craik, supra*); thereafter, reduction is the only method of review (*Matthew*, 1843, 6 D. 305).—[See Mackay, *Practice*, i. 268, *Manual*, 68. 118.]

Brocage.—Brocage is properly the hire or commission paid to a broker, but the use of the word is practically confined to marriage brocage contracts, or bonds promising a reward to one who shall procure a marriage between parties by means of the influence he may have over one of them. No action can lie for the implement of such contracts; they are void as *contra bonos mores*, and on account "of their pernicious tendency to unhappy marriages, the infamous profit derived, disobedience to parents encouraged, the destruction of the peace of families, and the ruin and unhappiness of the parties themselves" (Bell, *Com.* i. 321; *Campbell*, 1678, Mor. 9505, "which process moved laughter"; *Earl of Buchan*, 1698, Mor. 4546, an undecided action for the payment of the expenses of Sir John Cochran in England while negotiating a marriage; *Thomson*, 1770, Mor. 9519, Hailes, i. 339, in which the point was fairly decided). By the

same rule, if ready money or other valuable consideration is given, it must be returned (Bankt. i. 114). In England, a bond given by the husband to his wife's father to induce him to give his consent to the marriage, has been held contrary to public policy (*Keat*, 2 Vern. 588); and a bond to forgive a debt due is in the same position (*Hamilton*, 2 Vern. 558; Addison, *Law of Contracts*, 1195). See Pactum Illicitum.

Brocard.—A legal maxim embodying or illustrating a rule or principle of law, *e.g.*, *qui tacet, consentire videtur* (silence implies consent). The term brocard owes its origin to a collection of legal maxims entitled *Brocardica* (*Brocardicorum opus*), compiled about the beginning of the eleventh century by Burchard or Bouchard (in Latin, Burcardus and Brocardus), a learned bishop of Worms. The main sources of his work were the civil and canon laws, from which he excerpted most of those doctrines which he afterwards expressed in the form of short and condensed sentences, known to our law as brocards. The value of such a work was of course much greater in an age when a few clearly defined and general principles of law, rather than many minute and analytical distinctions, were the recognised criteria in determining disputes. With the vast increase which has since taken place in all branches of human activity, the necessity for well-established and comprehensive rules of law is none the less apparent, and where these exist in a convenient form, their retention is manifestly desirable. Of those relating to constitutional principles, many are to be regarded rather as rules of public policy than as maxims of strict law, *e.g.*, *salus populi suprema lex*, a brocard which is based on the principle that in cases of necessity the welfare of the individual must yield to that of the community. As examples of the maxims which illustrate the prerogatives of the Crown may be cited the brocards—*rex nunquam moritur; rex non potest peccare.* These rules imply that the law ascribes to the sovereign, in his political capacity, an absolute immortality, and in his individual and personal character an incapacity for doing wrong. Most of the brocards which relate to the administration of the law are more of the nature of rules of practice than fundamental legal principles. Such, for example, are the maxims—*nemo debet esse judex in propria sua causa* (no one ought to be a judge in a cause wherein he is interested); *actus curiæ neminem gravabit* (the act of the Court shall prejudice no man); *cursus curiæ est lex curiæ* (the Court is master of its own practice); *de minimis non curat prætor* ("the praetor does not apply his equitable remedies in matters of small moment"). In addition to the brocards which enunciate rules of law or of practice, there are the maxims which result from simple processes of reasoning, and which are generally regarded as self-evident truths. Thus it is an "old and well-established maxim in legal proceedings," that things which do not appear are regarded as non-existent (*de non apparentibus et non existentibus eadem est ratio*). As distinguished from the brocards which illustrate rules of practice, there are those which embody fundamental doctrines of law, and which will be found to comprise the following important principles: that where there is a right there is a remedy (*ubi jus ibi remedium*); that the law looks not at the remote but at the immediate cause of damage (*in jure non remota causa sed proxima spectatur*); that the act of God shall not, by the instrumentality of the law, work an injury (*actus dei nemini facit injuriam*); that damages shall not in general be recovered for the non-performance of that which it was impossible to do (*lex non cogit ad impossibilia*); that ignorance of the law does

not, although ignorance of facts does, afford an excuse (*ignorantia facti excusat, ignorantia juris non excusat*); that a party shall not convert that which was done by himself, or with his assent, into a wrong (*volenti non fit injuria*); that a man shall not take advantage of his own wrongful act (*nullus commodum capere potest de injuria sua propria*); that the intention, not the act, is regarded by the law (*actus non facit reum, nisi mens sit rea*); and that a man shall not be twice vexed in respect of the same cause of action (*nemo debet bis vexari pro una et eadem causa*). The acquisition, enjoyment, and transfer of property afford room for the application of many of the most familiar brocards known to the law. Such, for example, are the maxims—*qui prior est tempore potior est jure* (he has the better title who was first in point of time); *sic utere tuo ut alienum non lædas* (enjoy your own property in such a manner as not to injure that of another person); *assignatus utitur jure auctoris* (an assignee is clothed with the rights of his cedent); *accessorium principale sequitur* (the accessory follows its principal). As instances of the brocards relating to marriage and descent may be cited the maxims—*consensus non concubitus facit matrimonium* (the consent of the parties, not their concubinage, constitutes marriage); *pater est quem nuptiæ demonstrant* (he is the father whom the marriage indicates to be so). With regard to the interpretation of deeds and written instruments, there are the brocards—*certum est quod certum reddi potest* (that is certain which can be made certain); *falsa demonstratio non nocet* (an erroneous description does not make an instrument inoperative); *qui hæret in litera hæret in cortice* (who holds by the letter holds by the bark, *i.e.* "he who considers merely the letter of an instrument, goes but skin-deep into its meaning"). As examples of the maxims which illustrate the law of contracts may be cited the brocards—*in æquali jure melior est conditio possidentis* (where the right is equal, the claim of the possessor shall prevail); *qui facit per alium, facit per se* (he who does an act through the instrumentality of another is held as having done it himself); *actio personalis moritur cum persona* (a personal right of action dies with the person). Lastly, as examples of the brocards which relate to the law of evidence, there are the maxims—*omnia præsumuntur rite et solemniter esse acta* (all things are presumed to have been rightly and regularly done); *res inter alios acta aliis neque nocet neque prodest* (a transaction between two parties neither injures nor benefits those who are not parties to it). [See Trayner's *Latin Maxims*; Broom's *Legal Maxims.*]

Broker.—A broker is a limited agent who is employed in making bargains or contracts between other persons in matters of trade, commerce, and navigation. He is a mere negotiator of contracts relative to property, with the custody of which he has no concern, having power to bind his principal in relation to any particular transaction by the entry in his books, and the passing of bought and sold notes between the parties. In modern practice he frequently performs the further function of passing a delivery-order to the seller for his signature, and passing it when signed to the purchaser; but in all this he is merely an intermediary or negotiator, and so long as he acts in this way only, not assuming to have any use, property, or possession of the goods either for himself or another, he incurs no personal liability (Bell, *Prin.* 219; Bell, *Com.* i. 459, 507). See Bought and Sold Note. The term broker in its largest sense may be applied to anyone who acts as a medium of negotiation and contracts any kind of bargain;—"all persons are brokers who contrive, make, and conclude

bargains between merchants and tradesmen for which they have a fee or reward" (*Milford*, 16 M. & W. 117);—but here the word is used in its emphatic meaning of a broker for the sale or purchase of goods, the other classes of brokers being dealt with under the appropriate titles of INSURANCE BROKER; SHIPBROKER; and STOCKBROKER.

"A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them" (Blackburn on *Sale*, 78). He is often confounded with a factor; but there is this essential difference between the two agencies, that the factor is, whereas the broker is not, intrusted with the custody of the goods. It follows that a factor, having a special property in the goods and a lien upon them, is authorised to sell in his own name, and his principal is bound by the consequences: there is a right of setting off a debt due by the factor; and he may receive payment, and, further, receive it, so far as his lien extends, otherwise than in money. A broker, on the other hand, being a mere middleman making contracts for his principal, or simply introducing seller and buyer, has, apart from usage, none of these powers, the scope of his implied authority being, as will appear, much more limited.

APPOINTMENT AND TERMINATION.

The appointment of a broker, as of other agents, may be by writing, or by parole, or may be assumed from the conduct of parties (see AGENCY). Whether conferred by deed or not, his authority may be revoked, at any time before it is completely exercised, by the principal giving notice to the agent, or it may be determined by the agent giving notice of renunciation (*Freeman*, 8 L. J. (N. S.) ch. 44), reserving to each any claim of damages for breach of contract. *Primâ facie* a broker is the agent only of the principal who employs him (*Darrell*, 6 H. & N. 660); but when he is employed to buy or sell goods for one person, and he agrees with another for their sale or purchase, he is considered to be the agent of both (Chitty on *Contracts*, 455). But if a broker is given a discretion as to the terms of purchase or sale, it is evident that he cannot properly act for both parties, for it is impossible to reconcile the duties of buying cheap and selling dear. "But there is nothing to prevent a broker being an agent for both parties on those points where their interests are the same. The broker who is trusted to sell at the best price he can get, must be the vendor's agent, and his only, in settling what the price is to be; but when that is agreed upon, he may well be agent for both buyer and seller in seeing that the terms of the contract are clearly understood and made binding in law" (Blackburn p. 78; *Thomson*, 1 C. P. D. 777).

AUTHORITY AND POWERS.

The implied authority and powers of a broker for sale are, generally speaking, those of other agents, with the modifications necessitated by the special nature of his employment, or established by usage. "The authority of a broker to bind his principal may, by special agreement, be carried to any extent that the principal may choose; but the customary authority of brokers is for the most part so well settled as to be no longer a question of fact dependent upon evidence of usage, but a constitutent part of that part of the common law known as the law-merchant, or the custom of merchants" (Benjamin on *Sale*, 249). And if the broker's authority be specially limited, the party dealing with him has still a right to consider all that is done by the broker, within the scope of his general authority, as binding on the principal, unless he

has notice of the special limitations (Byles, J., in *Heyworth*, 17 C. B. (N. S.) 298). So a broker has implied authority to transact in accordance with the usages of the particular market or trade in which he may be employed, so long as these usages are not inconsistent with his employment as broker (*Harker*, 57 L. J. Q. B. 147 C. A.). But the custom of trade must be such as merely controls the mode of performing the contract, and not such as in any way alters its intrinsic character. And therefore proof of usage could never warrant the conversion of a broker from an agent to buy for his employer, into a principal to sell to him (*Mollett* L. R. 7 H. L. 802; *Waddell*, 4 Q. B. D. 678); nor in such a case is it material to show that the broker has charged or paid a fair price (*Rothschild*, 5 Bli. (N. S.) 165). He will not be permitted, directly or indirectly, to buy of or sell to himself, even if his motive be honest and he does better for his principal than if he had bought or sold in the open market. But if the custom is of general observance and not unreasonable, the principal's ignorance of it does not prevent his being bound, for his liability does not depend on his knowledge of the customs of the market in which he is dealing, but on the implied authority of his broker to act according to these customs, whatever they may be, within the limits of reason (*Grissel*, L. R. 3 C. P. 112; *Maxted*, L. R. 6 Exch. 132; *Nickalls*, L. R. 7 H. L. 530). See STOCKBROKER. As instances of the effect of usage may be mentioned the limitation of the broker's authority to the day on which it is given (*Dickinson*, 4 Camp. 279); authority to sell in his own name with an indemnity from liability and a lien on the price, and a right of set-off against the buyer (*Cropper*, L. R. 3 C. P. 199); and to sell with a warranty (Leake on *Contracts*, 437). But generally, and unless the rule is displaced by proof of custom (*Mackenzie*, 1886, 13 R. 494), a broker has no authority to sell in his own name, and if he does so his principal is not bound (*Baring*, 2 Barn. & Ald. 137). He may fix the price and the time and mode of payment, and may sell on reasonable credit, if no usage is proved to the contrary (*Boorman*, 3 Q. B. 511; *Wiltshire*, 1 Camp. 258); but in the latter case power is reserved to the principal to object within reasonable time to the credit of the buyer (*Hodgson*, 2 Camp. 530). A broker has no implied authority to receive the price (*Baring, supra*); and a purchaser who pays a broker, knowing him to be such, may still be sued for the price, unless he has been induced to pay the broker by the seller's own conduct (*Irvine*, 5 Q. B. D. 414). But if the principal remains undisclosed when the time of payment arrives, the purchaser may pay the broker (*Campbell*, 1 Stark, 233, and *Morris*, there cited; Campbell on *Commercial Agency*, 341), and generally in this connection the principal may be bound by custom of trade, or if the course of dealing between the parties warrants it (*Baring, supra*). A broker has no implied power of *delegation*. He is presumably employed from belief in his personal skill, and he has no right, without notice, to turn his principal over to another of whom he knows nothing (*Cockran*, 2 M. & S. 301). And if the sale is carried through by a sub-agent, the principal may recover the goods or their value (*Henderson*, 1 Y. & J. 387; *Cockran, supra*); or he may affirm the transaction, and claim all profit beyond remuneration and charges (*De Bussche*, 8 Ch. Div. 286). But here, as in other cases of agency, the rule is subject to exceptions. The exigencies of business from time to time render necessary the carrying out of the instructions by a person other than the original agent; and when that is the case, the reason of the thing requires that the rule should be relaxed, so as to constitute direct privity of contract between the principal and sub-agent (*De Bussche, supra*). But it must be observed that a broker may have power to appoint a sub-agent

and yet have no power to establish privity of contract between him and his principal. See AGENCY. A broker has no power to cancel a contract concluded by him (*Venos*, L. R. 2 H. L. 296), or to vary its terms without fresh authority form his principal (*Blackburn*, 2 Camp. 343).

RIGHTS AGAINST THIRD PERSONS.

It follows from the nature of his employment, that so long as a broker acts within the scope of his authority he can have no right to sue on the contract. The moment the sale is completed, the broker is as a rule *functus officio*, and can neither sue nor be sued (*Blackburn*, 2 Camp. 341); but he may have such an interest in the subject-matter of the contract as to warrant his suing in his own name. So where a broker had advanced money on the credit of a cargo consigned for sale, he was entitled to an action, although the sale note gave the principal's name; and the buyer could not set-off a debt due to him by the principal (*Atkyns*, 2 Esp. 493). If, however, by the introduction of the name of the principal into the contract, the defender has been prejudiced, he will be entitled to use that as a defence (Addison on *Contracts*, 323). But in *Smith*, 2 B. & C. 401, it was held that a broker who had stipulated for a share of the profit, and was liable for a share of any loss incurred, had no such interest as entitled him to an action.

DUTIES AND LIABILITIES TO PRINCIPAL.

The duties and liabilities of a broker to his principal are generally those of other agents. He must exercise his best discretion, skill, and diligence, and carefully obey any instructions as to amount, time, place, and price. So where A. employed B. to buy goods of the best quality, and B. delegated his employment to C., who bought an inferior quality, A. recovered damages from B. for breach of duty, and B. was entitled to recover from C. the full amount of the damages and costs incurred by him in the action by A. (*Mainwaring*, 2 Moore, 125). All profits and advantages made by the broker in performance of the undertaking belong to his principal, and it is the broker's duty to keep true and accurate accounts, and to render them within reasonable time. He is bound to account to his principal for all secret profits (*Turnbull*, 20 L. T. 218). So in *Morison*, L. R. 9 Q. B. 480, where the matter is fully discussed and the authorities reviewed, the purchaser of a ship recovered from a broker, employed by him to purchase as cheaply as possible, a sum received from the vendor's broker by way of commission. But to enable the principal to recover, the profits must be clearly the outcome of the special transaction. So if a broker is employed to buy one species of goods, and is promised by third parties a *bonus* if he succeeds in inducing his employer to buy another species of goods, the latter probably could not claim the *bonus* as profits made in the course of the agency, unless the broker had undertaken to give all his time to his employer (Evans on *Agency*, 292). A broker who takes an interest for himself or for another client in a purchase or sale negotiated by himself, is bound to fully disclose to his principal the exact nature of that interest: and it is not sufficient merely to disclose that he has an interest, or to make such statements as might put the principal on his inquiry (*Dunne*, L. R. 18 Eq. 524).

LIABILITIES TO THIRD PERSONS.

If a broker acts within the scope of his authority, and contracts in the ordinary form, describing himself and signing as broker, and naming his

principal, he incurs no personal liability, no action is maintainable by him, and he cannot be sued on the contract (*Fairlie*, L. R. 5 Exch. 169). Nor, as a general rule, is it necessary to name the principal, so long as it is clear on the face of the contract that the broker is a mere agent (*Southwell*, 1 C. P. D. 374). But in this case, if the buyer's name is not previously communicated by the broker, the seller has a power of rejection within a reasonable time after disclosure. The broker, however, may incur liability by intention on the face of the contract making him liable as well as the principal, or by usage of trade; as in the case of stockbrokers who are liable to each other as principals. See STOCKBROKER. (*Fleet*, L. R. 7 Q. B. 126; *Homfrey*, 7 El. & Bl. 266; *Pike*, 18 Q. B. D. 708, custom of hop trade.) And even if known to be, and described in the contract as, a broker, he may be liable, as in *Hutcheson*, 13 Q. B. D. 861, where the contract was in this form: "We have this day sold to you the following goods . . . *A. & B.*, brokers," the word "brokers" being held to be merely descriptive. The Court went even further in *Paice* v. *Walker*, L. R. 5 Exch. 173. There the contract was as follows: "Sold A. J. Paice about 200 quarters wheat (as agents for John Schmidt & Co.), etc. (Signed) Walker & Strange"; and it was held that the brokers, by merely describing themselves as agents for a named principal in the body of the contract, had not relieved themselves of the liability implied in their unqualified signature. Considerable doubt, however, was thrown on this decision in the later case of *Gadd* v. *Houghton*, 1 Exch. Div. 357, and it can hardly be looked on as an authority. "According to the earlier authorities," says Mr. Benjamin, "it required very strong internal evidence to rebut the presumption of liability arising from an unqualified signature of the contract, while the later authorities appear to warrant the proposition, that in the absence of usage the question is one of the construction of the contract as a whole, together with all the surrounding circumstances, and that the signature being made without qualification is only one fact to be considered in considering the contract . . . Where the signature of the agent is followed by qualifying language, his freedom from liability is undoubted; and where the agent is a broker or middleman, the presumption is that though he has signed without qualification, he intended only to make a contract between parties, and in absence of proof of usage he will not be held personally liable" (Benjamin on *Sale*, 212; and see *Homfrey, ut supra*; *Fleet, ut supra*). The rule is thus stated in Evans on *Agency*, p. 231:—"If the contract is signed without the use of any words importing agency, the person so signing is, by virtue of the contract, both entitled and liable, unless in the body of the contract a contrary intention is clearly shown. The accuracy of this principle is not affected by the doubt thrown on the decision in *Paice* v. *Walker* by the decision in *Gadd* v. *Houghton*." But a broker who is liable from having contracted in his own name may be relieved of liability by the other party's election of the principal as the responsible person. The question of whether election has or has not been finally made is one of fact; but apart from this, the effect of the cases is, that a seller may make his election whenever the principal is discovered, and the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is that in the former case the election may be made at the very time the contract is made (per Smith, J., in *Calder*, L. R. 6 C. P. 486). The principal's liability is not affected by the fact that credit was given to the broker (*Waring*, 1 Camp. 85); but the fact of election once established, the other party is finally relieved. A broker, like any other agent, may also render himself liable to third parties by assuming authority which he does not in fact possess, whether it be that he has no authority at all, or merely that it is insufficient for the

purpose. In such a case the party contracting with him is entitled to be put in the same position as he would have been in had the broker's representation been true, and he may recover what he actually loses by non-performance of the contract (Evans on *Agency*, 357; *Panmure*, 24 Ch. D. 367). But if a broker contracts for an alleged principal, he cannot be made liable as a contracting party simply because a principal does not exist. The remedy of the other party is an action of damages for breach of the implied contract that the broker had the authority he professed to have, or for misrepresentation (*Hollman*, 1 Cab. & El. 254), the measure of damages being the amount that would have been recoverable from the alleged principal if he had duly authorised, and refused to perform, the contract (*Simons*, 7 El. & Bl. 568; *Randell*, 18 C. B. 786; Addison, p. 886; Chitty, p. 318). If a person professes to act as broker, but it is proved that he is in fact the principal, acting on his own behalf, he is liable on the contract. A broker who contracts for a principal, and in regular course of trade sells goods for him whom, in good faith, he believes to be the owner, is not liable to the true owner of the goods. But a broker who, however innocently, obtains possession of goods of which a person has been fraudulently deprived, and disposes of them as being himself the principal, is liable to the true owner (*Hollins*, L. R. 7 H. L. 757).

Rights against Principal

As regards the rights of the broker against his principal, he is entitled, on fulfilling his undertaking, to commission, reimbursement, and indemnity. The amount of the *commission* may have been previously agreed upon, or it may be determined by reference to the custom of the particular market or trade. Many difficult questions have arisen as to a broker's right to commission; but generally it may be said that, in order to recover, he must show his employment and prove that he has done all that he bargained to do (*Fisher*, 4 App. Ca. 1). The transaction must be the direct, though not necessarily the immediate, result of his agency, which must be the *causa causans*, although not the *causa proxima*, of the bargain being concluded (*Jeffrey*, 7 T. L. R. 618 C. A.; *Toulmin*, 58 L. T. 96 H. L.). But if the broker has brought the parties together in a matter which results in a contract, it is not necessary that he should be present at its completion, or even be then acting for one of the principals, provided that he was the direct cause of the bargain being struck: and he may be entitled to his commission even although his principal is not aware that the contract resulted from his agency (Campbell on *Agency*, 572; *Moss*, 1875, 2 R. 657; *White*, 1876, 3 R. 1011; *Walker*, 1883, 11 R. 369; *Jacobs*, 1894, 21 R. 623; *Menzies, Bruce-Low*, & *Thomson*, 1895, 22 R. 299, where the purchaser failed to pay the price). If it appears that the broker has been prevented by any wrongful act of his principal from fulfilling his undertaking, he is entitled to commission (*Simpson* 17, C. B. 603): so the broker's right to commission cannot be defeated by the seller stepping in and himself completing a sale negotiated by the broker: nor by the principal refusing to sell, or changing his terms, or selling the property to another, or by so negligently dealing with the proposed purchaser as to lose the benefit of the sale (Mechem on *Agency*, s. 967). See Agency. A broker is entitled to *reimbursement* of all expenses, and to *indemnity* against loss incurred in transacting his principal's business. But if the expense or loss has been unnecessarily incurred (*Clegg*, 6 L. T. R. (N. S.) 180), or is the result of the broker's own misconduct or neglect (*Duncan*, L. R. 8 Exch. 242), or while acting in excess of his express or implied authority

(*Fletcher*, 15 M. & W. 755), he cannot recover. Nor is he entitled to indemnity or reimbursement in respect of any transaction obviously or to his knowledge illegal. So when A. employed B. to purchase smuggled goods, and B. did so and paid for them, B. could not recover the price from A., even if A. had obtained possession of the goods (*Mather*, 3 Ves. 373). But if the broker is not aware of the illegal intention of the parties, but negotiates the contract in ignorance of its unlawful nature, he may recover compensation and outlays; and the same is the case where the contract procured by the agent is not itself illegal, although it becomes so by the conduct of one of the parties (Evans, p. 407). As to gambling transactions, see STOCKBROKER; and it may be remarked in this connection that the Gaming Act, 1892 (55 Vict. c. 9), has been held not to apply to Scotland (*Russell*, 1 S. L. T. 533). As a broker, in the sense of the term here employed, has generally no possession of the property, he has no general lien such as is given to a factor. And even a factor, who also acts as a broker, has no lien for his general balance on the subjects of the brokerage transactions (*M'Call & Co.*, 1824, 2 S. App. 188; *Dixon*, 10 C. B. 398; *Mildred*, 8 App. Ca. 474). But an insurance broker is by general usage intrusted with possession of the policies he effects, and has a lien upon them and sums recovered under them. See INSURANCE BROKER; LIEN.

RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.

The rights of the principal against third persons on contracts made by a broker are, in general terms, those which control in the case of similar contracts made by other agents. He can enforce all contracts made in his name or on his behalf, and is entitled to the same remedies as he would have had if he had contracted in person. But the principal's right to enforce contracts made by his agent is subject to this qualification: that if the broker is allowed to deal in his own name, the party dealing with him will enjoy the same rights and equities against the employer as he would have had against the broker had he really been a principal (*Sims*, 5 B. & A. 389; *Blackburn*, 2 Camp. 341; *Warner*, 1 M. & W. 591). When the broker has not contracted in his own name, nor been intrusted with possession of the property, third persons cannot set-off against the principal debts due by the broker (*Young & Son*, 1852, 14 D. 647; *Baring*, *supra*; *Cooke*, 12 App. Ca. 271).

As many of the English decisions turn on the customs of London brokers, it should be noticed that, although elsewhere absolutely free, the brokers of London were from very early times subject to the control of the corporation of the city. They were bound by the regulations of the corporation under the Statutes of 6 Anne, c. 16; 10 Anne, c. 19, s. 121; and 57 Geo. III. c. 60, which required *inter alia* a bond and an oath and the keeping of certain books. The Brokers Relief Acts, however, of 1870 and 1884, removed practically all restrictions, and put an end to the jurisdiction of the Court of Aldermen (Benjamin, p. 249; Russell, *Factors and Brokers*, Appendix).

[See Addison on *Contracts*; Chitty on *Contracts*; Campbell on *Commercial Agency*; Evans on *Agency*, 235, 257, etc.; Benjamin on *Sale*; Blackburn on *Sale*, 78; Smith, *Mercantile Law*, 630; Bell, *Com.* i. 459, 507; Bell, *Prin.* 219.] See also AGENCY; BOUGHT AND SOLD NOTE; FACTOR.

Brothel.—See CRIMINAL LAW AMENDMENT ACT; DISORDERLY HOUSE.

Bubble Act, 1719 (6 Geo. I. c. 18).—This Act was passed the year before the crisis of the South Sea Scheme, in order to restrain the formation of joint-stock companies. It authorised the king (s. 1 *et seq.*) to grant charters for the incorporation of two companies, one for the assurance of ships, goods, and merchandise at sea or going to sea, and another for lending money on bottomry. The capital of each company was not to exceed £1,500,000, and each company was to pay £300,000 to Exchequer. Other corporations or societies, but not private persons, were prohibited from carrying on marine insurance or bottomry business. In addition (s. 18 *et seq.*), all undertakings or projects tending to the common grievance, prejudice, and inconvenience of the lieges in their trade, commerce, or other lawful affairs, and all public subscriptions, assignments, transfers, and all other matters for furthering such undertakings, and more particularly acting as a corporate body, and raising a transferable stock without legal authority, were declared, after 24th June 1720, to be illegal and void, and a public nuisance, and all offenders convicted on information or indictment in any of His Majesty's Courts of Record at Westminster, or in Edinburgh, or Dublin, were subjected to the fines, penalties, and punishments to which persons convicted of common and public nuisances were liable; and, moreover, were declared to incur a *præmunire*. Penalties were also imposed on brokers buying or selling shares in such undertakings. The latter provisions of the Act (ss. 18–21) remained on the Statute book till repealed by 6 Geo. IV. c. 91. They were never enforced in Scotland, though they were pleaded in 1730 in the case of the *Mason Lodge of Lanark*, Mor. 14554; and in England they were to a large extent ignored. Notwithstanding the prohibitions, companies were formed and their stocks subscribed and transferred.

This is borne out by the preamble of another Act passed in the same year (6 Geo. IV. c. 131), which declares that the practice has prevailed in Scotland of instituting societies possessing joint stocks, the shares of which are either conditionally or unconditionally transferable, for the purpose of carrying on banking and other commercial concerns, many of which have transacted business for a number of years to the great advantage of that country; and that it would be attended with great detriment to the country if the proceedings of such societies that have taken place were not sanctioned by the Legislature. The Act accordingly legalised from its date all such societies, and authorised them to sue and to be sued either in their own name or in that of their principal officer. This Act was limited in its duration to one year, but was by an Act of the next year (7 Geo. IV. c. 67) made perpetual as regards banking companies. See Lord President Inglis in *Muir* v. *City of Glasgow Bank*, 1878, 6 R. 392 (399–400).

Building Restrictions.—Restraints imposed upon a proprietor of ground as to the character of the buildings he may erect thereon, or the use to which he may put them, are called building restrictions. Such limitations on the use of property are usually inserted in feu-charters or feu-contracts with a view to secure uniformity in the style of buildings in streets or squares, or to preserve the amenity of a residential district. They may be of infinite variety, and are not confined to such conditions as are recognised servitudes existing for the benefit of some dominant tenement. As noticed below, it will be seen that, unlike servitudes, they have no validity unless they appear on the face of the recorded title.

Constitution of.—Like other real conditions, building restrictions are

only effectual if they comply with certain requirements. The law upon this matter is thus stated in the leading case of *Coutts* (1834, 13 S. 226, 1 Rob. Ap. 296, at p. 306). "To constitute a real burden or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone; and those words must be inserted in the sasine which follows on the conveyance, and of consequence appear on the record. In the next place, the burden or condition must not be contrary to law, nor inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy—for example, by tending to impede the commerce of land or create a monopoly. The superior or party in whose favour it is conceived must have an interest to enforce it" (see *Morier*, 1895, 23 R. 67; and for instances of stipulations, bad because contrary to public policy, see *Yeaman*, 1770, Mor. 14537; *Orrock*, 1762, Mor. 15009; *Browns*, 1823, 2 S. 298 (want of interest)). If the requisites mentioned above occur, it is not necessary that the burdens be declared real, that any particular form of words be used, or that the conditions be fenced with irritant and resolutive clauses. The words used to create such burdens do not require to be so clear and precise as are necessary to protect a burden of a personal nature, *e.g.* the payment (usually reserved) of money, to which, in the stricter sense, the term real burden is applied. By 31 & 32 Vict. c. 101, s. 10, and 37 & 38 Vict. c. 94, s. 32, a real condition in a conveyance may validly be created by reference to another deed duly recorded in which the condition is inserted.

Examples.—Building restrictions may take the form of an obligation to build houses on the subject of a certain description, or at a certain distance from the road; of an obligation to erect an iron railing, and to put down a foot-pavement; or of a prohibition against the use of the houses or buildings as stables; or for the purpose of carrying on therein certain trades, etc. But if the obligation be not really *ad factum præstandum*, but resolve itself into the payment of an indefinite sum of money, *e.g.* to pay two-third parts of the expense of enclosing and forming the area, in middle of the square in which the premises stood, and of upholding the same in complete repair, it is bad (see *Coutts, supra*; *Cockburn*, 1825, 4 S. 128; *Middleton*, 1894, 21 R. 781; *E. of Zetland*, 1882, 9 R. (H. L.) 40; *Tennant, Marshall's Tr.*, 1888, 15 R. 671, 762; Rankine, *Landownership*, 3rd ed., 406–424).

Reference to a Plan.—A common method of imposing these restrictions is by reference to a feuing plan. The mere exhibition of a plan at the date of a sale of the property does not constitute a binding engagement that all shall be done that appears on the face of said plan (*Her. Hos.*, 1814, 2 Dow, 301). Nor is a mere reference to a plan in the charter sufficient. To be effectual, such reference must not be made merely for the purpose of identifying the subject; and it must be clear that the parties intended the plan to be part and parcel of the contract between them (*Dirom*, 1812, note to 18 F.C. 26, 6 Pat. at p. 368; *Walker*, 1825, 3 S. 650; *Barr*, 1854, 16 D. 1049; *Free St. Mark's*, 1869, 7 M. 415; *Assets Co.*, 1896, 33 S. L. R. 407). A plan may, however, be written into a contract though not mentioned therein, *e.g.* where it is specially prepared with a view to delineating the subjects, and is endorsed on the charter and signed by the superior (*Crawford*, 1874, 2 R. 20). Where feuars, with a title to object, objected to alterations on a building on the ground that they were disconform to a plan, but the plan had been lost, it was held that, as it was to be presumed that the buildings had been erected

in conformity with the plan, it lay on the proprietor proposing alterations to show that said alterations were not disconform to the plan (*Sutherland*, 1887, 15 R. 62).

Title to Object to Infringement of Building Restrictions.—In the ordinary case, only the superior can enforce conditions of the nature of building restrictions. Such stipulations are regarded as merely conditions of tenure between superior and vassal, and there is no room for the doctrine of *jus quæsitum tertio*. But, under certain circumstances, a feuar may claim the benefit of restrictions contained in the feu-contracts of other feuars. To give this right, however, it is not sufficient that several feuars of neighbouring plots of building ground in the same street hold from the same superior, unless some mutuality and community of rights and obligations be otherwise established between the feuars; and this can only be done (1) by express stipulation in their respective contracts with the superior, (2) by reasonable implication from some reference in both contracts to a common plan or scheme of building, or (3) by mutual agreement between the feuars themselves. As put by L. Watson: "In order to the acquisition of such a *jus quæsitum*, it is essential that the conditions to be enforced shall appear in all the feu-rights, that they shall in all cases be similar, if not identical, and of such a character that each feuar has an interest in enforcing them" (*Hislop*, 1881, 8 R. (H. L.) 95, at p. 101). The doctrine thus laid down has been followed in several subsequent cases. In *Calder* (1886, 13 R. 623) it was held that, as the conditions and restrictions of the original feu-contract were not at the date of the action in the titles of all the lands originally feued out thereby, but had been abandoned as to some, the co-feuars had no right to enforce the conditions. In that case the common feuing plan or scheme embraced four acres, the feuars on which constituted the community. The common plan came to an end by the superiors, who had re-acquired one of the areas, feuing it out to different feuars on essentially different conditions and restrictions. The result of this action did not give the other feuars any right or *jus quæsitum* to insist that a common scheme, which should embrace three only of the areas originally feued out, should be maintained. Lord Adam said: "I think all the feuars of the original four areas must be bound, or none. I know no authority for saying that, where a common feuing plan has been abandoned in essential respects *quoad* certain of the feuars, it shall nevertheless continue in force as regards the others." In *Walker & Dick* (1888, 15 R. 477), A., the superior, began to feu out his estate. In his feu-contract with B., the vassal was taken bound to erect only cottages and villas on the ground, while the superior, on his part, undertook to insert similar conditions in the titles of subsequent feuars. Thereafter A. feued ground to C. by a feu-contract which contained clauses binding the vassal to erect villas only, and obliging the superior to insert similar conditions in the titles of disponees feuing ground to the north of that taken by C. Subsequently, A. and B. discharged each other of the above obligations; and thereafter B. feued from A. a plot of ground to the north of C.'s ground. In this latter contract between A. and B. there were no restrictions as to the class of buildings to be erected on the ground by the vassal. In a petition to the Dean of Guild by B., for warrant to erect tenements of dwelling-houses in flats and shops on the ground last acquired by him, it was held, on appeal, that B.'s title was not subject to any restriction in favour of C., whose action, if he had one, was for damages against the superior, owing to his failure to insert the restriction in B.'s title. A power reserved to the superior to dispense with the restriction is inconsistent with such mutuality

of rights between the feuars as to entitle one of them to found on said restriction (*Turner*, 1890, 17 R. 494). For earlier cases, where the co-feuars have been held not to have a title, see *Blackwood* (1825, 4 S. 26); *Carson* (1863, 1 M. 604. See also the later case of *Johnston*, 1893, 20 R. 539). On the other hand, there are many cases in which a feuar's title has been sustained in an action by him against co-feuars to enforce the building restrictions. In the case of *Cockburn* (1825, 4 S. 128, 2 W. S. 293), action was allowed, since the conditions were evidently intended for the benefit of the feuars; but this doctrine has been subsequently curtailed, and such mutuality as that described in *Hislop's* case insisted on (see *Alexander*, 1871, 9 M. 599, 605, 609; *Ewing*, 1878, 5 R. 439; *Free St Mark's*, 1869, 7 M. 415). If a *jus quæsitum* arising from mutuality of rights and obligations between feuars is acquired, the superior cannot validly discharge any one feuar from the conditions and restrictions of the feu-contract without the consent of the rest (*Dalrymple*, 1878, 5 R. 847). Where, however, a feuar has no title to enforce a restriction, the objection to his title is not obviated by the consent and concurrence of the superior (*Hislop, supra*).

Interest to Maintain Action.—The party enforcing such a condition, whether superior or vassal, must have a legitimate interest to maintain the action. But *primâ facie*, the vassal, in consenting "to be bound by the restriction, concedes the interest of the superior, and therefore the *onus* is upon the vassal who is pleading a release from his contract to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist" (per L. Watson in *E. of Zetland*, 1882, 9 R. (H. L.) 40, at p. 47). What gives sufficient interest depends on the circumstances of each case. "The law sustains it as a sufficient interest that a proprietor in a row of houses wishes them to be maintained so as to show a uniform or symmetrical front or elevation; and if he has aptly and sufficiently stipulated for this in all the titles, it will be given him, though his only interest be an æsthetical one" (per L. Gifford in *Stewart*, 1878, 5 R. 1108, at p. 1115; see also *Beattie*; *Naismith*, 1876, 3 R. 634 and 863). But acquiescence in such circumstances as infer consent to the buildings complained of, or express or tacit abandonment of the restrictions, is fatal to the maintenance of an action for infringement (*M'Gibbon*, 1871, 9 M. 423; *Russell*, 1882, 9 R. 660; *Browns*, 1823, 2 S. 298; *Campbell*, 1868, 6 M. 943; *Fraser*, 1877, 4 R. 942; *Ewing*, 1877, 5 R. 230; *Calder, supra*).

Interpretation of.—The language employed to constitute building restrictions is strictly interpreted, there being a presumption in favour of freedom of ownership. Hence, if such stipulations are expressed in ambiguous terms, they must be construed *contra proferentem*, that is, against the superior, and in favour of the vassal who is to be limited in the use of his property (*Middleton*, 1894, 21 R. 781; *Millar*, 1888, 15 R. 991; *Hood*, 1884, 12 R. 362; *Dennistoun*, 1872, 11 M. 121 and 127; *Banks & Co.*, 1814, 1 R. 981; *Moir's Trs.*, 1880, 7 R. 1141; *Assets Co.*, 1896, 33 S. L. R. 407 (where a vassal sought unsuccessfully to enforce conditions against his superior)). On the other hand, if the words imposing restraint are clear and unambiguous, they must receive their full force and effect. In *Millar* (1896, 33 S. L. R. 383), a vassal was bound by a restriction in his feu-charter to erect no buildings other than villas or offices. He applied to the Dean of Guild for warrant to erect six contiguous self-contained houses of two storeys, with separate gardens before and behind. The superior having objected, the Court, affirming the

decision of the Dean of Guild, held that the proposed buildings were a contravention of the restriction in the charter (see *Sandeman's Trs.*, 1892, 20 R. 210; *Greenhill*, 1824, 3 S. 325; 1825, 4 S. 160; *Partick Comrs.*, 1886, 13 R. 500; *Morrison*, 1874, 1 R. 1117: *Naismith*, 1876, 3 R. 863). Restrictions intended for the mutual benefit of a number of buildings are regarded as specially deserving of a fair construction (*Dennistoun*, 1872, 11 M. 121; *Thomson*, 1882, 10 R. 433).

See REAL BURDENS; SERVITUDES.

Building Societies.—Building societies are societies established for the purpose of raising by the subscription of the members a stock or fund for making advances to members out of the funds of such societies upon security of heritable estate, by way of conveyance or of bond and disposition in security. They are perfectly lawful associations at common law (*Pratt*, 1812, 15 East, 510), but without statutory recognition they are nothing more than associations or clubs. The Statutes regulating them are—

6 & 7 Will. IV. c. 32 (1836) | 37 & 38 Vict. c. 42 (1874)

as amended by—

38 & 39 Vict. c. 9 (1875) | 47 & 48 Vict. c. 41 (1884)
40 & 41 Vict. c. 63 (1877) | 57 & 58 Vict. c. 47 (1894).

The five last-mentioned Statutes are cited as the Building Societies Acts. The Acts 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36 (The Forged Transfer Acts) also apply to building societies. The Act of 1836 only remains in force for societies certified under it before the year 1856, and not re-certified under the Act of 1874. Otherwise it is repealed (Acts 1874, s. 7, and 1894, s. 25).

Building societies are unincorporated or incorporated. To the former class belong all those registered before 1874 and not re-registered under the Act of that year. All societies under the Act of 1874 are incorporated, having perpetual succession and a common seal (s. 9). Practically all societies must now be incorporated, except a few established before 1856.

There are two kinds of building societies: terminating and permanent. In the terminating society a uniform subscription is paid by all the members until the society terminates, the point of termination usually being when there are sufficient funds to give each member a sum of money fixed by the rules when the society was formed. The funds are advanced to members on heritable security, and the shares may be purchased at a discount by members.

Anyone joining a society after its commencement must make a "back payment." In the *permanent* society there is no fixed period for its winding up, and a member may join at any time. Balloting for priority of right to an advance is customary in some societies. This is forbidden as to societies established after 25th August 1894 (Act 1894, s. 12).

Under the Statutes, building societies are subject to stringent regulations. The Registrar of Friendly Societies and the Assistant Registrars have the superintendence of building societies. Rules must be registered, and there are certain provisions which the rules must contain (1874, s. 16: 1894, s. 1). No business can be carried on before registration (1874, s. 43). Any alteration in the rules, or change of name or place of business, must be registered (1874, ss. 18, 22; 1877, s. 2). Officers who have control of funds must find security (1874, s. 23). Failure to perform their statutory duties subjects directors or officers to heavy penalties (1894, s. 21). The taking of any gift or commission in connection with a loan is severely punishable

(s. 23). A statement of the funds must be made up annually, audited, and lodged with the Registrar (1874, s. 40; 1894, ss. 2, 25). This applies to unincorporated societies formed under the Act of 1836. Large powers of inspection and control are given to the Registrar by the Act of 1894, extending so far as to entitle him to order the society to be wound up (1894, s. 7). The exercise of some of his powers requires the approval of the Secretary of State. Powers of borrowing are limited by the Acts 1874, s. 15; 1894, s. 14. Powers of investment are strictly defined (1874, s. 25; 1894, ss. 17, 16). Provision is made for the speedy settlement of disputes by arbitration (1874, ss. 34, 36; 1884, s. 2; 1894, s. 20). But arbitration is not compulsory (*Dundee Provident Co.*, 1884, 11 R. 537); and see *Galashiels Society*, 1893: 20 R. 821, and *Municipal Building Society*, 9 App. Ca. 260. Questions between societies and their members are to be interpreted strictly according to the rules (*Brownlie*, 1883, 10 R. (H. L.) 19, and *Tosh*, 1886, 14 R. (H. L.) 6; *Auld*, 1887, 14 R. (H. L.) 27).

Proceedings in connection with the winding up of a building society in England take place under the Companies Winding-up Act 1890 (1894, s. 8). This Act does not apply to Scotland, and societies are here wound up under the Act of 1874 (s. 32, subs. 4), and A. S. 1882, relative thereto. The superintending Court is the Sheriff Court. In the case of an unincorporated society, procedure is under the Companies Acts.

In 1884 regulations were issued by the Treasury under sec. 44 of the Act of 1874.

The proceedings of building societies are exempt from stamp duties, except as to conveyances and bonds (1874, s. 41).

An ordinary building society may not purchase or hold land permanently (1894, s. 16). It differs in this respect from a co-operative building society registered under the Industrial and Provident Society Acts (*q.v.*). A society of this kind can buy and sell land to any extent. But it must add the word "Limited" to its name, and no one person can have a greater interest than £200 (56 & 57 Vict. c. 39).

[See Davis, *Law of Building and Land Societies*; Macomo, *Building Society Acts*; Fowke, *Industrial and Provident Societies.*] See FRIENDLY SOCIETIES.

Bull.—(Lat. *bulla* = a boss or seal).—This term originally signified the seal which was appended to the edicts of the pope. Eventually the word came to denote a letter, edict, or rescript of the pope, published or transmitted to the churches over which he had jurisdiction, containing some decree, order, or decision. The peculiar connection which existed between the doctrines of the Church of Rome and certain principles of political government led to the passing, shortly after the Reformation, of severe penal Statutes against Roman Catholics. Various civil disabilities and penalties were imposed by those Statutes, and some of them made the offences which they dealt with punishable as treason. One of the latter class was the Act 13 Eliz. c. 2, Parl. 2 and 3, which made it treason (s. 2) to use or put in use in any place within the realm, or in any of the Queen's dominions, any bull, writing, or instrument, written or printed, of absolution or reconciliation, obtained from the pope, or to grant or promise any such absolution or reconciliation by colour of any such bull, writing, instrument, or authority, or to receive and take any such absolution or reconciliation. By the said Act it was also treason (s. 3) to obtain or get from the pope any manner of bull, writing, or instrument containing

any thing, matter, or cause whatsoever, or to publish or put in use any such bull, instrument, or writing. By sec. 4, aiding and abetting these offences entailed punishment in terms of the Statute of Præmunire (16 Rich. II. c. 5); while (s. 5) those who concealed and failed to disclose a bull or reconciliation offered to them were guilty of misprision of treason. The treason law of England was extended to Scotland by 7 Anne, c. 21.—[Hume, i. 532.] See TREASON.

Bullion.—Gold or silver in the lump, as distinguished from coin or articles manufactured from gold or silver. The term is also applied to coin and articles made of gold or silver when considered simply with reference to their value as raw material. The purity of gold is measured by twenty-fourth parts. In their pure state gold and silver are too soft to be used alone for the manufacture of coin, and for the purpose of hardening them a certain alloy is mixed. To the product the term bullion is usually applied. Ever since 1553, in the reign of Edward VI., the bullion used for the gold coinage has been twenty-two carats of pure gold and two carats of alloy. The standard of silver was fixed by William the Conqueror at 11 ozs. 2 dwts. fine, or 222 dwts. of pure silver, to 18 dwts. of alloy. Since these standards were established they have, with the exception of a short period of confusion from the 34th Henry VIII. (1543) to Elizabeth, been maintained (Macleod, *Theory and Practice of Banking*, vol. i. p. 143).

All persons are entitled to demand from the issue department of the Bank of England, Bank of England notes in exchange for gold bullion, at the rate of £3, 17s. 9d. per ounce of standard gold; but before payment the bank are in all cases entitled to require such gold bullion to be melted and assayed, by persons approved by them, at the expense of the parties tendering such gold bullion (7 & 8 Vict. c. 32, s. 14). The Treasury may from time to time issue to the Master of the Mint, out of the growing produce of the Consolidated Fund, such sums as may be necessary to enable him to purchase bullion in order to provide supplies of coin for the public service (33 & 34 Vict. c. 10, s. 9). See Regulations of the Scots Parliament as to Bullion. Skene, *h.t.*; Liability of Bullion to Contribute to Salvage (*The Lonford*, 1881, L. R. 9 P. D. 60).

Burdens.—The term "burden," in its widest sense, is applied to any incumbrance, restriction, or limitation affecting heritable property, or to any obligation incumbent on a person or corporation as the owner of property, heritable or moveable. The more important burdens are those which affect heritable property.

Scope of this Article.—The present article deals at length with the incumbrance on heritable property known as the "real money burden," but leaves out of view limitations which are imposed by the law of neighbourhood, such as public nuisance, servitudes which depend for their effect on notoriety, and those building restrictions, including conventional nuisance, known as real conditions. An enumeration is, however, given, for the sake of convenience, of those burdens and limitations, such as servitudes, nuisance, terce, courtesy, liferents, and others, arising or imposed either *ex lege* or *ex contractu*, which will be found more fully and appropriately dealt with under other heads in the present work.

REAL MONEY BURDENS.—These are created (1) by *reservation*, either in the original grant or in a deed of transmission of lands—the case of most frequent occurrence being that where the seller allows a portion of the

price to remain on the security of the property as a debt due to him by the purchaser. These burdens may also, however, be created (2) by *constitution*. This most frequently takes place where a testator conveys lands to one person under the burden on the lands of the payment of provisions, legacies, or annuities to others, or where testamentary or other trustees convey lands, either by arrangement or under directions by the testator, to a beneficiary under such burdens in favour of other beneficiaries.

The *essentials* to the valid creation of a real money burden, either by reservation or constitution, are—

(1.) *The creditor in the burden must be named or clearly pointed out* (Ersk. ii. 3. 50; *Stenhouse*, 1765, Mor. 10264).

(2.) *The sum must be specific in amount* (*Stenhouse, supra*, and *Allan*, 1780, Mor. 10265 (1781), 2 Pat. 572, 3 Ross L. C. 10, and *Tailors of Aberdeen*, 1834, 13 S. 226; remitted for opinion, 1837, 2 S. & M'L. 609; aff. 1840, 1 Rob. Ap. 296, hereafter referred to as *Coutts' Case*).

(3.) *The burdens must be imposed on the lands and not merely on the disponee.*—Thus, where the disposition only bears that the disponee shall be burdened with and be bound to pay the amount without imposing the burden on the lands themselves, there is no valid constitution of a real burden (*Lovat*, 1821, Robertson's Ap. 355). The same result follows (*a*) where the disposition merely contains an obligation on the disponee, his heirs, executors, and successors (*Forbes' Trs.*, 1833, 12 S. 219); (*b*) where it only bears to be granted under burden of the sum secured, and imposes it on the disponee by acceptation (*Martin*, 1808, Mor. App., *Personal and Real*, No. 5); (*c*) where it simply declares that the disposition is granted under burden of the payment of the sums specified to the persons named (*Stewart*, 1792, Mor. 4649; *MacIntyre*, 1824, 2 S. 664). In all these cases the burden was merely made a personal obligation upon the disponee and his representatives, and, while no *voces signatæ* are necessary, the terms employed must clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs only (*Coutts' Case*).

(4.) *It must appear in the dispositive clause of the conveyance.*—(*Allan, supra*; *Williamson*, 1887, 14 R. 702). This is the ruling clause of the disposition, and the burden, in order to form a proper incumbrance upon the subject conveyed, must be there constituted. It is only in cases of ambiguity that other clauses or expressions in the deed can be admitted in explanation of that clause (*Shanks*, 1797, Mor. 4295; *Forrester*, 1826, 4 S. 831; *Sutherland*, 1801, Mor. Tailzie, App. No. 8; *Chancellor*, 1872, 10 M. 995). In the case of *Williamson* above cited, Lord President Inglis laid it down that a real burden could not be constituted by a general disposition, without description of the lands conveyed, and notarial instrument thereon in terms of Schedule L. of the 1868 Act. A real burden was clearly not constituted by the disposition and notarial instrument referred to in that case, but the general rule has probably been too broadly stated.

(5.) *The burden must enter and be kept up in the record* (*Coutt's Case*).—While it was made competent by the Act 10 & 11 Vict. c. 47, s. 6, and subsequent Statutes (10 & 11 Vict. c. 48, s. 5; c. 49, s. 4; c. 50, s. 4; c. 51, s. 27; 23 & 24 Vict. c. 143, s. 31), re-enacted by 31 & 32 Vict. c. 101, hereafter cited as the "1868 Act," s. 10, to refer to a recorded deed, containing the burden, the original constitution of the burden in that deed must have been in accordance with the legal requirements to which reference has been made. It was decided, in the old case of *Allan, ante* (see also *Wylie*, 1830, 8 S. 337), that a reference in the original disposition to a separate deed, as containing the declaration of the burden, was insufficient.

The enactments before mentioned only made it competent to refer to burdens, etc., already duly constituted. But the Act 37 & 38 Vict. c. 94, s. 32 (the Conveyancing (Scotland) Act, 1874, hereafter cited as the "1874 Act"), authorised reservations, real burdens, etc., to be imported by reference into original grants. The enactment and schedule therein referred to are as follows:—

"Reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations affecting land may be validly and effectually imported into any deed, instrument, or writing relating to such lands, by reference to a deed, instrument, or writing applicable to such lands or to the estate of which such lands form a part, recorded in the appropriate register of sasines, and in which such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations are set forth at full length, and a reference in the form set forth in Schedule H hereto annexed, or in a similar form, shall be sufficient. And it shall be lawful for any proprietor of lands to execute a deed, instrument, or writing setting forth the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations under which he is to feu or otherwise deal with or affect his lands or any part thereof, and to record the same in the appropriate register of sasines. And the same being so recorded, such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations may be effectually imported, in whole or in part, by reference into any deed or conveyance relating to such lands subsequently granted by such proprietor, or by his heir or successor, or by any person whatsoever, provided it is expressly stated in such deed or conveyance that it is granted under the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations set forth in such deed, instrument, or writing."

SCHEDULE H OF CONVEYANCING ACT, 1874.

The reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations [*or, as the case may be*], specified in [*refer to the deed, instrument, or writing in such terms as shall be sufficient to identify it, and specify the register in which it is recorded, and the date of registration, or where the deed, instrument, or writing referred to is recorded, on the same date as the deed, instrument, or writing containing the reference, here say* recorded of even date with the recording of these presents].

The reference even under the 1874 Act must be to a recorded deed where the amount of the burden, name of the creditor, and other requisite particulars are set forth at full length, and the principle of the cases of *Allan* and *Wylie* (*ante*) and of *M'Donald*, 1821, Hume, 544—in which last case it was held not enough to set forth the total amount due to several creditors without naming them, and to refer to a relative unrecorded list—still applies. The position of matters when the disponee's title remains personal will be immediately referred to.

AN IRRITANT CLAUSE, while it may raise a presumption of intention, will not make real a burden clearly personal or otherwise defectively imposed (*Coutts' Case*). But it is of importance inasmuch as it may effectively prevent the omission of the burden from the original infeftment and from subsequent transmissions. If there is no irritancy, an infeftment may be expede, omitting the declaration of the real burden, the disponer be thus divested, and the burden not be real. If, however, the disposition provides for the insertion of the burden under pain of an irritancy, its omission would nullify the instrument, and the granter would remain infeft and undivested (*Coutts' Case*). The irritant clause should also be made to apply to the omission of the burden, or of a valid reference thereto, in all

future transmissions. A *clause of direction* may also be used in a conveyance in order to prevent the omission of burdens from the infeftment of an original disponee (1868 Act, s. 12).

Nature of Creditor's Right and Mode of Enforcing the same.—The real money burden, although an heritable right or lien upon the lands, is not a proper feudal estate, and the creditor in it is not infeft in the lands in security of the sum due. His real right is completed by the infeftment of the *disponee*. The burden imposes no personal obligation on the disponee. The creditor has no active title of possession, no power of sale of the lands, and no title to raise an action of maills and duties, or to arrest the rents or other funds of the debtor. But when the real burden has been duly constituted, it is a sufficient warrant for an action of poinding of the ground, and the creditor can lead an adjudication (Bell, *Com.* i. 693), after which the remedy of an action of maills and duties will be open to him. The powers of the creditor in a reserved burden may, however, be enlarged by express stipulation (*Wilson*, 1822, 1 S. 316; 1824, 2 Sh. App. 164). When a personal obligation is desired, a personal bond by the disponee must be taken either in the disposition or apart; but this personal obligation will not transmit against a singular successor in the subjects unless he expressly undertake it (*Gardyne*, 1853, 1 Macq. 358; *King's College of Aberdeen*, 1 Macq. 526, 14 D. 675; *Brown's Trs.*, 1852, 14 D. 680). If the personal obligation is contained in the disposition constituting the real burden, it may be transmitted by an agreement *in gremio* of a subsequent conveyance under sec. 47 of the 1874 Act. The personal obligation, when taken, is enforceable in the same manner as a personal bond.

Where the *disponee remains uninfeft*, the granter remains undivested, and the burden is merely a qualification on the disponee's personal right. But an assignee will take the personal title subject to the burden and qualification (Bell's *Lect.* 1152).

Form of Disposition.—The disposition bears to be granted in consideration of a certain sum (if any) paid.

> And in consideration of the further sum of £ herein declared to be a real burden upon, and affecting the lands and others after disponed, and which sums of £ and £ make up the agreed on price of the said lands and others.

And the burdening declaration inserted in the dispositive clause immediately after the description is as follows:—

> Declaring always, as it is hereby expressly provided and declared, that the subjects hereinbefore described (or referred to) are disponed with and under the real burden of the foresaid sum of £ sterling, being that part of the price thereof remaining unpaid, as before narrated, interest thereof at the rate of per centum per annum, from the term of during the not payment, and one-fifth part more of the said principal sum of liquidate penalty in case of failure in the punctual payment thereof to me, my executors (*or* my heirs excluding executors, *as the case may be*), or assignees whomsoever, at the term of (*if a personal bond has been granted, say* all conform to personal bond, dated , granted by the said *B.* to me therefor): And which sum of £ sterling, interest and penalty as aforesaid, are hereby declared a real and preferable burden upon and affecting the subjects hereby disponed, and are appointed to be inserted in any notarial or other instrument to follow hereon, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, and other writs of or relating to the said subjects, or any part thereof, so long as the said burden or any part thereof shall remain unpaid, otherwise such deeds, decrees, instruments, and writs, shall be void and null.

If the real burden is to be constituted in favour of *a third party*, the form will be altered accordingly.

Miscellaneous.—A personal bond is frequently taken from the debtor

in the burden. In place of directly constituting a burden, the granter, either of an original right or ordinary *inter vivos* conveyance, may reserve power to himself or delegate it to a third party, to impose a burden on lands, and the burden will be effectual if imposed in terms of the power. Where the right is to be exercised by a third party, infeftment in favour of such third party is unnecessary. A reserved power in favour of the granter of a disposition may even be exercised by the contraction of debts by such granter, the creditors in which may make their right real by adjudication (see FACULTY TO BURDEN). Real burdens do not, apart from personal obligations expressly undertaken, transmit against personal representatives not taking up the subjects (*Macrae*, 1891, 19 R. 138). A purchaser has a right to retain part of the price of subjects purchased, against real money burdens affecting them and other real grounds of eviction (so found as to teree, *Boyd*, 1805, Mor. 15874); indeed, he may require the removal of such burdens prior to payment of the price, although they may not have been made real (*Ralston*, 1830, 8 S. 927).

STAMP DUTIES.—A disposition *inter vivos* creating a real burden is liable in stamp duty on the full price (if any, or otherwise with the 10s. duty), and mortgage duty of 2s. 6d. per cent. on the burden (Stamp Act, 1891. s. 57 and 86 (*f*)); a personal bond, as being a collateral security, in 6d. per cent.; writs of acknowledgment and notarial instruments, including the certificate under sec. 49 of the 1868 Act, each in a duty of 5s.: minutes excluding or removing the exclusion of executors, in 10s. (doubts have been expressed on this point); assignations and discharges, in 6d. per cent.: assignations for effectuating the appointment of a new trustee, in a duty of 10s.; partial discharges, 10s. each, or 6d. per cent. on the total amount of the burden, if less than £2000, the last discharge being liable in 6d. per cent. on the total amount of the burden; restrictions, where no price paid, 10s., or 6d. per cent. on the total amount of the burden, if less.

TRANSMISSIONS INTER VIVOS.—Previous to the commencement of the 1874 Act (1st Oct. 1874), real money burdens (as never having been the subject of, but merely a burden on, the infeftment) were transferred by assignations intimated to the debtor. These assignations were usually recorded in the register of sasines, but intimation to the debtor was the proper mode of completing the title; and accordingly, in cases of competition, questions of preference fell to be decided by priority of intimation (*Miller*, 1840, Hume 540). Sec. 30 of the 1874 Act, however, provides that—

"It shall be lawful to record in the appropriate register of sasines any deed, instrument, or writing whereby any real burden upon land is assigned, conveyed, or transferred, or is extinguished or restricted. No deed, instrument, or writing executed or dated after the commencement of this Act, whereby any real burden upon land shall be hereafter assigned, conveyed, or transferred, shall be effectual in competition with third parties, unless the same is recorded in the appropriate register of sasines: and such deed, instrument, or writing, shall take effect in competition with third parties only from the date of such registration: and intimation, according to the existing law and practice, shall be unnecessary when such deed, instrument, or writing is recorded; and real burdens upon land may be assigned, conveyed, or transferred, and extinguished or restricted, and titles thereto may be completed as nearly as may be in the same manner as in the case of heritable securities constituted, or requiring to be constituted, by infeftment in favour of the creditor as defined by The Titles to Land Consolidation (Scotland) Act, 1868, and the whole provisions, enactments, and forms of that Act and of this Act relative to the assignation, conveyance, or transference, and extinction

or restriction of bonds and dispositions in security and other heritable securities constituted, or requiring to be constituted, by infeftment as aforesaid, and to the completing of titles thereto, and also the forms referred to, as well as the provisions and enactments contained in section 117 of the said Act, shall be taken to apply, and shall apply, as nearly as may be, to real burdens upon land; provided always, that securities by way of ground annual, whether redeemable or irredeemable, shall continue to be heritable as regards the succession of the persons in right thereof; and provided also, that where a real burden upon land shall have been assigned, conveyed, or transferred by any deed, instrument, or writing, which has entered the appropriate register of sasines, it shall not be necessary to produce to the notary public expeding any notarial instrument applicable to such real burden, or to set forth in such notarial instrument, as a warrant thereof, the deed, instrument, or writing constituting the said real burden; but it shall be sufficient to produce to him and to specify shortly in such notarial instrument, the deed, instrument, or writing, or the deeds, instruments, or writings whereby the said real burdens shall have been assigned, conveyed, or transferred, and which, or one or more of which, if there are more than one, shall have entered the appropriate register of sasines."

The section last above quoted does not affect the mode of constitution of real burdens, but it assimilates the mode of transmission and extinction of such rights to that of other heritable securities. The preference in competition with third parties since 1874 accordingly depends on the date of recording, and as regards them, intimation has become unnecessary. But as between the debtor and creditor in the burden, intimation will be sufficient. The section makes the form of assignation given in GG and the form of notarial instrument given in HH of the 1868 Act, together with the relative section of that Act (124), applicable to real money burdens. Sec. 65 of the 1874 Act, substituted for sec. 129 of the 1868 Act, provides for the completion of the title of adjudgers by recording, with warrant of registration thereon, either the abbreviate of adjudication or an extract of the decree, in the appropriate register of sasines. It is also provided by the above-quoted section, that when a real burden shall have been assigned or transferred by any deed, instrument, or writing which has entered the appropriate register of sasines, it shall not be necessary to produce to the notary expeding a notarial instrument applicable to the burden, or to set forth in such notarial instrument as a warrant thereof, the deed, instrument, or writing constituting the burden. As a burden cannot be assigned, etc., by an "instrument," it has been doubted whether, until an assignation or deed of transmission of the burden (and not merely a notarial instrument) has been recorded, the production of the deed, etc., constituting the burden can safely be dispensed with (Mowbray, *Hendry's Styles*, 305). But the doubt does not seem to be well founded, as the intention of the enactment is clear. In practice, however, the recorded deed forming the original constitution is frequently produced to the notary until an assignation or deed of transmission, which can be used as a warrant, has been recorded.

A *Trustee in Bankruptcy* or *Liquidator* may expede a notarial instrument in the form of Schedule LL of the 1868 Act, using his act and warrant or appointment (1868 Act, s. 25).

Succession and the Completion of the Titles of Executors, Disponees, Legatees, or Heirs (as the case may be).

(*a*) *Succession.*—Previous to the commencement of the 1874 Act, the real money burden descended to the heir who took up the right by general service (*Cuthbertson*, 1806, Mor. App., Service and Confirmation, No. 2). The section

of the 1874 Act above quoted (s. 30) provides that the enactments of sec. 117 of the 1868 Act "shall be taken to apply, and shall apply as nearly as may be, to real burdens upon land," an exception being made in the case of ground annuals, whether redeemable or irredeemable. The result is that these real burdens are now *moveable* as regards the succession of the creditor, and belong to his executors or representatives *in mobilibus, except* (1) when they are conceived expressly in favour of such creditor and his heirs or assignees or successors, excluding executors; or (2) where the creditor has excluded executors by a minute in the form of Schedule DD of the 1868 Act (in the case of an unrecorded security or conveyance, or deed relating to the security, it may be endorsed on the deed), recorded in the appropriate register of sasines; (3) ground annuals as already noted; (4) *Quoad fiscum* (*i.e.* as regards the rights of the Crown under Act 1661, c. 32, to the moveable estate of persons denounced rebels), and accordingly real burdens do not fall under the single escheat; (5) courtesy; (6) terce; (7) *jus mariti* (where the right still exists, and whether acquired by the wife by succession or as original creditor (*Hodge*, 1879, 7 R. 259)); (8) *jus relictæ*, and consequently *jus relicti*, and (9) legitim—in which cases, and as to all which rights, the real burden remains heritable. Bygone interest, however, falls to executory. The exclusion of executors may be removed by the creditor (*a*) executing and recording in the appropriate register of sasines a minute in the form of Schedule EE of the 1868 Act, or (*b*) by assigning, conveying, or bequeathing the security or burden to himself, or to any other person, without expressing or repeating the exclusion,—the removal of the exclusion in the latter case taking effect on the assignation, conveyance, or bequest doing so,—namely, in the case of an *inter vivos* assignation or conveyance on delivery or recording; of a *mortis causa* assignation or conveyance on the testator's death; and of a bequest on vesting. The exclusion of executors (seldom, however, met with) may thus be imposed and removed at pleasure. It is recommended that the minutes should, when there have been transmissions, apply in terms both to the original security and to the last transmission. The opinion has been expressed that sec. 117 of the 1868 Act makes heritable securities moveable only in cases of intestate succession, *i.e.* in cases of competition between heir and executor (*Hare*, 1889, 17 R. 105). If, however, a testator simply conveys his moveable estate to one person and his heritable estate to another, heritable securities will fall under the former bequest (*Guthrie*, 1880, 8 R. 34).

(*b*) *Completion of Title.*—The result of the above-quoted section (30) of the 1874 Act makes the following modes of completing titles available:—

1. *Where creditor's title is complete* (by the infeftment of the debtor, and also, where there have been transmissions by the last creditor's title having been recorded), (1) by writ of acknowledgment (Schedule II of 1868 Act), under section 63 of 1874 Act, substituted for section 125 of the 1868 Act, as regards the title of executors nominate, disponees, legatees, or heirs. Executors completing a title must be duly confirmed (1874 Act, s. 63), and this should appear in the writ: (2) by notarial instrument Schedule JJ, under section 126 of the 1868 Act, as regards executors dative and heirs of a creditor dying intestate; and (3) by notarial instrument Schedule KK of the 1868 Act, under section 64 of the 1874 Act, substituted for section 127 of the 1868 Act, as regards executors nominate, or disponees, or legatees. When the burden descends to the heir (*i.e.* where executors are excluded), the heir's title is completed by writ of acknowledgment (Schedule II), or by notarial instrument in the form of Schedule JJ, as before mentioned, a decree of general or special service being, in the latter

case, used as the connecting link or warrant for the instrument (1868 Act, s. 128). An *Heir of Provision* can also complete his title in this manner (*Hare*, 1889,17 R. 105). Disponees may also use Schedule L of the 1868 Act (s. 19) and Schedule N of the 1874 Act (s. 53).

2. *Where Creditor's title is personal*, by a notarial instrument, Schedule MM of the 1868 Act, under the corresponding section 130 (enacted by the Amendment Act of 1869). This is the form applicable to all classes of successors, where the ancestor's title was personal—it being kept in view that the right to the burden itself must enter the record (thus differing from other heritable securities) before a direct title can be completed.

Discharge or *Extinction.*—The incumbrance is extinguished as ordinary debts are. The invariable practice, even before the 1874 Act, which assimilated the mode of discharging real burdens to that of other heritable securities, when the burden was extinguished by payment, was to obtain and record a discharge in the appropriate register of sasines. The forms rendered applicable (under the 1874 Act, s. 30) are, of *discharge*, Schedule NN, with section 132 of the 1868 Act, and of *deed of restriction*, Schedule OO, with section 133 of that Act; and the form for disencumbering the lands *where a discharge cannot be obtained*, Schedule L, No. 2, with section 49 of the 1874 Act, will be available.

Forms.—The forms applicable to Exclusion of Executors, Removal of Exclusion, Transmission, and Discharge, will be found under HERITABLE SECURITIES.

PERSONAL BURDENS.—The nature of these has already been indicated. Where the grantee is taken bound by acceptance of the right, but where there is no clause charging the subject, or where the clause and infeftment do not conform to the rules applicable to real burdens before laid down, the burden (assuming it to be otherwise lawful) is personal, and will be binding on the grantee and his representatives, while not affecting the subject. The mode of constitution and recovery is that applicable to an ordinary debt, regard being had to the terms of the obligation.

OTHER BURDENS.—The following is an enumeration of the other burdens affecting heritable subjects or the proprietors thereof, which will either be found dealt with under their respective heads, or referred to in other articles of the present work—(*a*) *Burdens arising* ex lege *or by force of fiscal and other Statutes, e.g.* land tax, ecclesiastical assessments, and public burdens, succession duties (16 & 17 Vict. c. 57, s. 42), and estate duties (57 & 58 Vict. c. 30, s. 9); (*b*) *terce* and *courtesy*, arising from the marital relations; (*c*) *teinds*, as requiring a separate title, where the right to them has been separately feudalised, and *stipend* as a burden on the teinds (these are *debita fructum*, not *debita fundi*); (*d*) *casualties of superiority*, subject to 1874 Act, non-entry, relief, composition, liferent escheat; (*e*) *obligations and restrictions created and imposed by Statute, e.g.* those under the General Police, Public Health, and Special Municipal Acts; (*f*) *public nuisance*; (*g*) *burdens arising from or under grants express or implied* from the Crown or subject superior, *e.g.* Crown duties and feu-duty (with additional feu-duty, taxed casualties, and services); reservations, as of minerals, salmon-fishings, or sporting rights; servitudes, *e.g.* mill-dam and lade; bleaching, right of way (peat, foot, horse, drove, or cart roads, as distinguished from public right of way), pasturage, thirlage, feal and divot, stone and slate, sand and gravel, sea ware for manure, and the urban servitudes of light, air, and prospect (but *not* cutting timber, kelp for manufacture, golfing, *jus spaciendi*, trout-fishing, etc.), building conditions, including conventional nuisance; (*h*) *burdens arising under family settlements, or deeds creating a limited*

ownership, e.g. entail, liferents, localities, provisions and annuities; (*j*) *burdens arising under special contracts or security deeds, e.g.* entailer's debts, real warrandice (including that implied in excambions), heritable securities and ground annuals; (*k*) *burdens affecting possession,* as feu, leasehold, and crofters' rights; (*l*) *burdens arising or imposed by prescription*—public rights of way, as well as certain of the servitudes above enumerated; (*m*) *burdens imposed by diligence or judicial decision, e.g.* inhibition, adjudication for debt (where adjudication is looked on as a title to lands, it, on the other hand, is subject to the burden of redemption and expiry of the legal), interdiction, inhibition and adjudication implied in mercantile sequestration, litigiosity, and jedge warrants of the Dean of Guild Court in respect of repairs.

Burdens (Public).—See Public Burdens.

Burdenseck or **Burdensack** was an old rule in the law of Scotland, which is no longer recognised, and was an exception to the ordinary law of theft. The rule was to the effect that if a person, being in a state of destitution, in order to satisfy hunger took a calf, or a ram, or as much meat as he could carry on his back, this was not theft. There is doubt, however, as to whether the exception was of so extensive a nature as this, some authorities being of opinion that the rule of Burdenseck operated only as a mitigation of the punishment, and not as a complete answer to the charge of theft. This is the view of Baron Hume, who treats the subject under the heading of Crimes committed under compulsion by want, and he states it as, in his time, "the settled law of Scotland that the judge shall apply the ordinary pains of law in this, as in every other case, where a person knowingly, and for his own advantage, has taken the property of his neighbour: leaving it to the necessitous offender to supplicate his relief from his Majesty" (Hume, i. 55; cf. Skene, *Treatise on Crimes,* ch. 13, 9).

As the rule has for long been obsolete in Scots law, it is of no consequence, except as a matter of historical interest, how far it applied. It is not surprising that such an exception to the ordinary law has fallen into disuse, seeing that it is dangerous in principle, and must have been found unjust if not impracticable in its application (see S. L. T. i. 410).

Burgage.—In the feudal system burgage tenure is (as to the question of its abolition, see *infra,* p. 256) a manner of holding of lands and buildings within the territories of royal burghs. These burghs were created or "erected" by force of a royal charter granting jurisdiction and liberties: providing for (or implying) services of watching and warding: and, it might be, stipulating for payment of a certain "burgh mail" to the king. The charter might or might not define the territory of the burgh more or less exactly. It is not, however, to be understood that burgage tenure was limited to within the burgh wall or to the town. The territory of the burgh might extend far beyond. Nor, on the contrary, does it follow that everything within these limits is or was burgage. There might be exceptions, express or implied, in the charter of erection, applicable to property held in feu of subject superiors, which was especially the case when a burgh of regality was raised to the status of a royal burgh. In that case the charter applied to the effect of constituting such property part of the burgh, but

the feu-holding and the superior's rights were preserved intact. Again, the burgh might, after its erection, acquire additional territory by purchase or otherwise; that would not be burgage except by force of a new erection. An exception of another kind arises from the granting of feus of property held burgage (see *infra*, p. 251). It is to be observed that the term burgage as here used is descriptive of a feudal *tenure*, not of a burghal or other *area*. The last-mentioned exception, indeed, shows that the same property may be held burgage and non-burgage at the same time, but in different relations.

This tenure is proper only to royal burghs, and not to burghs of any of the other kinds known to the law of Scotland; but there are indications that burghs of regality might acquire by custom some of the qualities of burgage tenure. Musselburgh, indeed, is an instance of a burgh of regality with titles bearing to be held of Her Majesty in free burgage; but Musselburgh, though not a royal burgh, holds a royal charter. Accordingly, it appears that not only might there be a royal burgh without proper burgage tenure, but also, on the other hand, that there might be burgage tenure, or an approximation to it, outwith a royal burgh.

Apart from Coatbridge, which is a very recent statutory addition, there are seventy royal burghs in Scotland. Of these it is understood that sixty-four have burgage tenure and a burgh register of sasines, and that the remaining six have neither. Musselburgh, which, as just mentioned, has a burgage tenure though only a burgh of regality, has no burgh register.

For the sake of completeness, the names of the burghs may be given. The following are the sixty-four royal burghs with burgage tenure and burgh register:—

Arbroath.	Dunbar.	Irvine.	North Berwick.
Aberdeen.	Dundee.	Jedburgh.	Peebles.
Annan.	Dunfermline.	Kilrenny.	Perth.
Anstruther Wester.	Dysart.	Kinghorn.	Pittenweem.
Auchtermuchty.	Earlsferry.	Kintore.	Queensferry.
Ayr.	Edinburgh.	Kirkcaldy.	Renfrew.
Banff.	Elgin.	Kirkcudbright.	Rothesay.
Brechin.	Falkland.	Kirkwall.	Rutherglen.
Burntisland.	Forfar.	Lanark.	St. Andrews.
Crail.	Forres.	Lauder.	Sanquhar.
Cullen.	Fortrose.	Linlithgow.	Selkirk.
Culross.	Glasgow.	Lochmaben.	Stirling.
Cupar-Fife.	Haddington.	Montrose.	Stranraer.
Dingwall.	Inverkeithing.	Nairn.	Tain.
Dumbarton.	Inverness.	Newburgh.	Whithorn.
Dumfries.	Inverurie.	New Galloway.	Wigtown.

The six royal burghs which have neither burgage tenure nor registers are: Anstruther Easter, Campbeltown, Dornoch, Inveraray, Kilrenny, and Wick. None of these ever had either burgage tenure or burgh register, except Dornoch, which had both. The Dornoch register was discontinued in 1809, and therefore the burgage tenure was gradually superseded.

The case of burghs with burgage tenure but with no register is specially provided for in sec. 151 of the Consolidation Act, 1868. The writs are recorded in the county register. The terms of that section, and also of sec. 153, are important in connection with what has been said above regarding the burghs in which burgage tenure is found. Sec. 151 speaks of "*any* burgh in which lands are held burgage"; and sec. 153 expressly refers, in a similar connection, to "any royal *or other* burgh."

It does not clearly appear what formalities or changes took place regarding the holding and titles of the individual owners on the erection of an area into a royal burgh. There is, however, authority for the statement that the grant to the community did not require sasine to perfect it. This certainly was so in the case of a re-erection (*Aytoun*, 1833, 11 S. 676). The same case establishes the power of the magistrates to prescribe a right of property for the community, notwithstanding the inclusion of the same subjects in private burgage titles renewed by the magistrates from time to time, but not clothed with possession.

The questions have been much discussed: Who is vassal in burgage tenure, the community of the burgh or the individual owner? and, What is the true aspect of the relation between the community and the individual owner? The answer is, that the only feudal superiority is in the Crown, that the community hold direct of the Crown their common property (so far as included in the royal charter), and also their burghal capacity and estate, with all attaching rights and privileges; and that the individual burgage owner holds his private property also direct of the Crown, and not of the community. That the burgh holds direct of the Crown is evidenced by the charter; the burgh in its origin is the legal creation of the Crown. It is this direct tenure that distinguishes royal burghs from burghs of regality. Robert the Bruce, indeed, attempted to interpose subject-superiors, as in the case of his grant of the royal burghs of Elgin, Forres, and Nairn to Randolph, Earl of Moray; but the attempt was frustrated by Statute (Innes, *Legal Antiquities*, 117). In like manner, it is beyond doubt that each individual owner holds his property direct of the Crown. The titles have always been express to that effect. Before 1847, on the occasion of a sale, the resignation by the seller was in the hands of the magistrates, as in the hands of the sovereign, "immediate lawful superior thereof"; and the Act of that year prescribed similar words, namely, "to be holden of Her Majesty in free burgage." Further, when a burgh was suppressed, the owners continued to hold direct of the Crown, but by blench tenure. It is necessary to keep distinct the two matters of feudal superiority and municipal jurisdiction and authority. "Though the bailies of the burgh have a superiority in point of dignity and jurisdiction over their fellow-burgesses, they are not for that reason superiors of the burgh in a feudal sense" (Ersk. II. iv. 9). But the two are co-related, for no burgage-holder could be infeft prior to 1847 without the intervention of one of the bailies and the town clerk. The origin of this rule is to be found in the Act 1567, c. 27 (34). It provides:—

> Forsamekle as the greit hurt done of befoir within burgh be geving of sesingis is privatlie without ane baillie and ane common clerk of burgh quhairthrow our Soverani Lordis liegis may bee defraudit greitlie, Theirfoir it is statute and ordanit . . . that na sesing be gevin within burgh of ony maner of land or tenement within the samin in ony tyme cuming, bot be ane of the baillies of the burgh and the commoun clerk theirof: And gif ony sesing beis utherwayis gevin heirefter, to be null and of nane availl, force, nor effect.

Notwithstanding some expressions apparently to the contrary, this Act is limited to burgage tenure; that is the true meaning of the phrase "within burgh." The action of the magistrates under the Statute was purely ministerial or executorial on behalf of the Crown. So strong was the rule requiring the intervention of the bailies, that a subsequent sasine so expede was preferred to a prior infeftment by direct act of the Crown (*Kincardine*, 1686, Mor. 6894). And even yet no one can be infeft in a burgage property without the intervention of the town clerk,

inasmuch as he still acts as keeper of the burgh register. This, indeed, does not now hold in the cases where there is no burgh register.

The peculiarities in burgage holding, as contrasted with other feudal tenures, are generally stated as: (1) no feu-duty; (2) no casualties; (3) greater freedom of alienation, but only by way of transferring the existing estate, for (4) it is generally laid down that the individual burgage vassal could not sub-feu. But each of these points requires explanation and modification:—

1. *Feu-Duty.*—The distinction grounded on the absence of feu-duty takes us back to the question, Who is the vassal? If the community be regarded as, or as representing, the vassal to certain effects, it may very well be said that the "burgh mail" before referred to was of the nature of a feudal payment or duty. But as regards the individual owner, there can be no feu-duty. It has been attempted in many cases to attach feu-duties to burgage tenure, but it has been clearly decided that to do so is incompetent and impossible (*Mags. of Arbroath* v. *Dickson*, 1872, 10 M. 630). Many properties in burghs are indeed held under titles which, while expressly declaring the holding to be burgage of the Crown, go on to condition that the property is so held for payment to the magistrates or other parties of an annual "feu-duty." The stipulated sums, however, are not feu-duties, nor can they be sustained as real burdens; but the proprietor for the time being, who has taken his title subject to the so-called feu-duty, is under personal liability therefor for the period of his ownership. These cases are, of course, to be distinguished from each of two separate operations, namely, the creation of (1) ground-annuals and (2) sub-feus. Of these the former always was, and the latter is now declared always to have been, an effectual method of alienating burgage property under reservation of a permanent annual payment. The constitution of a ground-annual was the usual method before 1874, on account of the inability (real or imaginary) to grant sub-feus. The principle of *Dickson's* case is the incompatibility of burgage tenure and feu-duty. There may be either, but not both. The method by ground-annual is effectual, because in it we have burgage without feu-duty; and the method by sub-feuing is effectual, because in it we have feu-duty without burgage. The ground-annual is not a feu-duty, but is merely a definite annual sum aptly reserved. Again, in the case of sub-feuing, the feu-duty is attached, not to the burgage tenure under which the granter of the feu himself holds, but to the ordinary feudal tenure under which the new vassal is to hold.

But while, in the case of the individual owner, there is not, and never was, any feudal payment, it is not to be inferred that there was no *reddendo* or return for the holding. It has already been stated that the charters of erection often expressed the condition of watching and warding as services to be rendered in return for the grant. But even though the charter was silent on the subject, such services were due by implication. They of course had reference to keeping order within the burgh, and warding off attacks from without. This again suggests the co-relation of the municipal and feudal functions in burgage tenure. Obviously the responsibility for order lay on the magistrates, and theirs was the duty of organising the town's bands; but the members of the force must needs be obtained from the individual burgesses. An interesting reference to this old burgage obligation of watching and warding is found in the Act for disarming the Highlands after the Rebellion of 1715 (1 Geo. I. c. 54). It contains (s. 6) an exception in the form of licence to "the magistrates of every burgh royal to have in their custody a sufficient number of arms for keeping

guard within their burghs, and the inhabitants of burghs royal to use the said arms in keeping guard, according to the directions of their respective magistrates." And the statutory clause of obligation to infeft introduced by the 1847 Act is declared to imply an obligation to infeft "for service of burgh used and wont."

2. *Casualties.*—If liferent escheat be accounted a feudal casualty, it is not correct to say that burgage knew or knows no casualty. Hope specially refers to this, and indeed expresses himself quite generally: "The casualties of superiority belong only to the king, such as liferent escheat by horning." He admits there is no non-entry; "whereof," he says, "there is no reason but custom" (*Minor Practicks*, 96). See also the Act of Annexation, 1587, c. 29, for the distinction between royal burghs and burghs of regality regarding "their non-entries." Erskine (II. iv. 8), following Craig, gives more definite reasons for the absence of that casualty, as well as those of ward, relief, and marriage, namely, that the burgh "neither marries, dies, nor is minor." This does not, perhaps, accord well with the doctrine that the individual owner is the direct vassal of the Crown; and besides, it fails in its application to blench holding, where ward and marriage at least were unknown, and in which the entry was often taxed at a purely nominal amount. The casualties of ward and marriage were peculiar to the military or ward holding, and therefore had no place in burgage, though it is true that Craig (1. 10. 31) assimilates burgage to ward tenure. Further, it is the case that neither relief nor composition was or is due. But as neither of these is or can be payable in modern feus, this distinction has so far disappeared.

3. *Alienation.*—The liberty of alienation of the existing estate (*i.e.* by substitution as distinct from subinfeudation) was a bold contrast with other feudal tenures. But this contrast gradually diminished as the like freedom was conferred in the other holdings. The contrast was complete only in very ancient times; it disappeared substantially in 1747 (20 Geo. II. c. 50, s. 12), and absolutely in 1847 (10 & 11 Vict. c. 48, s. 6). And even while this distinction remained in favour of burgage-holding, it was very materially modified by the fact that in the other tenures, while alienation by substitution was more or less incompetent, practically the same result could be reached by subinfeudation, unless that had been specially prohibited.

4. *Subinfeudation.*—In burgage tenure, on the other hand, it is usually laid down that subinfeudation was incompetent to the individual vassal. By the Conveyancing Act 1874 (s. 25), such power is expressly given, and all previous sub-feus receive statutory confirmation. But indeed there is no clear authority for the proposition even prior to 1874 (Hendry, *Manual*, 3rd. ed., p. 359). Certainly security infeftments *de me* were held effectual even before 1874 (*Bennet*, 1711, Mor. 6895). It was generally held that the magistrates could grant feus of burgage property for an adequate feu-duty (see L. Deas in *Dickson's* case, *supra*). In some instances royal charters contained express power to that effect. The charter of the burgh of Inverurie is an instance.

Apart from the qualities of the tenure itself, there a few general points which require mention:—

(1) *Terce.*—Until 1861 burgage subjects yielded no terce. But if the husband died after 6th August 1861, this distinction does not hold (24 & 25 Vict. c. 86, s. 12). The procedure for completing the widow's right is the same as in feu-holdings.

(2) *Teinds.*—The erection into a royal burgh does not carry teinds, nor does it give a title on which to found prescriptive possession of teinds.

The fact that property is burgage does not confer exemption from teind (*Learmonth*, 1859, 21 D. 890).

(3) *Entail.*—Burgage property may be entailed (Bell, *Conveyancing*,1020).

(4) *Long Leases.*—Although it was not until 1874 that sub-feus by individual burgage owners were recognised, the Registration of Leases Act, 1857, expressly authorised the creation of feudalised subordinate rights by way of lease. The only distinctions taken in the Act between feu and burgage tenures are (s. 18), that in the former it is, while in the latter it is not, necessary to set forth in the lease "the name of the lands of which the subjects let consist or form a part" and "the extent of the land let."

(5) Commons belonging to royal burghs and held in burgage tenure are excepted from the "Act concerning the dividing of commonties" (1695, c. 38 (69); *Hunter*, 1854, 16 D. 641).

(6) Jedge Warrants (*q.v.*).—These are not limited to burgage tenements, but extend to all buildings in burghs.

After 1847 (10 & 11 Vict. c. 49), and down to 1860, the differences in a disposition of burgage property as compared with a disposition of a feu-subject were—

1. The obligation to infeft was "to be holden of Her Majesty in free burgage."
2. Instead of an obligation to relieve the disponee of feu-duties, casualties, and public burdens, the relative obligation was "to free and relieve the disponee of all cess, annuity, ground-annual, and other public and parochial burdens."
3. The statutory form of warrandice was, "And I grant warrandice *as accords*," which, unless specially qualified, implied absolute warrandice as regards the lands and writs, and warrandice from fact and deed as regards the rents. The addition of the words "as accords" was curious; they would themselves have been held sufficient in certain circumstances to constitute a "special qualification" in the case of non-burgage property.
4. No precept of sasine. The reason was that infeftment could not be effected by confirmation, but only by resignation.

The following changes have been made from time to time on the above points:—

Between 1860 (23 & 24 Vict. c. 143) and 1868—

1. It was unnecessary to insert any obligation to infeft, but it must always have been convenient to have the distinct statement on the face of the title that the property was held burgage.
2. It was unnecessary to insert a procuratory of resignation. The reason was, that by the 1860 Act resignation was superseded.

Between 1868 (31 & 32 Vict. c. 101) and 1874—

1. There was introduced, in lieu of the obligation to infeft, a simple statement: "to be holden the said subjects of Her Majesty in free burgage."
2. The obligation to relieve referred to "ground-annual, cess, annuity, and other public burdens."
3. The words "as accords" were omitted from the warrandice clause when absolute warrandice was intended.

Since 1874 (37 & 38 Vict. c. 94)—

1. There can be no procuratory of resignation, and if such is inserted, it is to be held *pro non scripto* (s. 26).
2. "There *shall not*, after the commencement of this Act, be any distinction between estates in land held burgage and estates in land held

feu, in so far as regards the conveyances relating thereto" (s. 25). But the very next section permits the continued use of "the forms allowed by" the 1868 Act, and merely provides that "the forms applicable to lands held feu shall be applicable likewise." The fact is, that the two forms are indistinguishable, except that in burgage property, (1) in a description by reference, both burgh and county must be specified; (2) though it is not necessary, still it is practically convenient to have the tenure earmarked by the declaration that the property is "to be holden of Her Majesty in free burgage"; and (3) in the obligation of relief, the words "feu-duties and casualties" will be left out, and it is usual to specify "ground-annual, cess, and annuity"; but this clause gives nothing which would not be implied.

Accordingly, the following is a style of the modern disposition of a house held burgage:—

I, *A. B.*, in consideration of the sum of £1000 paid to me by *C. D.* (of which I acknowledge the receipt and discharge him), have sold and do hereby dispone to the said *C. D.*, and his heirs and assignees whomsoever, heritably and irredeemably, All and whole that house, 1 King Street, in the burgh and county of Edinburgh, with ground attached and pertinents, being the subjects particularly described in the disposition by *E. F.* in my favour, dated the 1st, and recorded in the Register of Sasines for the Burgh of Edinburgh on the 15th, both days of May 1894, together with my whole right, title, and interest, present and future, therein [*refer to burdens, if any*]: With entry at the term of Whitsunday 1896: To be holden the said subjects of Her Majesty in free burgage: And I assign the writs, and have delivered the same according to inventory: And I assign the rents: And I bind myself to free and relieve the said disponee and his foresaids of all ground-annual, cess, annuity, and other public burdens: And I grant warrandice: And I consent to the registration hereof for preservation.—In witness whereof, I have subscribed these presents at Edinburgh on the 10th day of May 1896 before the witnesses also hereto subscribing, whose designations are appended to their signatures.

G. H., W.S., Edinburgh, *Witness.* *A. B.*

I. K., clerk to said *G. H.*, *Witness.*

We now pass to consider the method and forms in which a disponee of burgage property has from time to time acquired, and now acquires, a real right. The main point to be kept in view is, that the procedure was always by resignation only. The resignation was made in the hands of one of the bailies of the burgh, as representing the Crown. The procuratory of resignation, prior to 1847, ran in these terms:—

And I bind me . . . to infeft and seize the said *B* . . ., and that by resignation in manner underwritten, to be holden of Her Majesty in free burgage for service of burgh used and wont; and . . . I hereby constitute . . . my procurators, giving to them full power . . . for me and in my name to compear before the Lord Provost or any one of the bailies of the burgh, and there, with all due reverence and humility as becometh, purely and simply by staff and baton, as use is, to resign, as I hereby resign, surrender, upgive, overgive, and deliver [*the property*] in the hands of the Lord Provost or any one of the bailies of the burgh, as in the hands of Her Majesty, immediate lawful superior thereof, in favour and for new infeftment of the same to be made to the said *B.*

The ceremony took place on the ground of the lands. The persons present were five, namely: (1) the procurator for the disponer and attorney for the disponee—one person; (2) one of the bailies of the burgh; (3) the town clerk, as notary; and (4, 5) two witnesses. The ceremony was twofold: resignation made by the old proprietor and accepted by the bailie, and sasine given by the bailie to the new proprietor. The symbols in the resignation were staff and baton; and in the sasine, earth and stone, and sometimes hasp and staple. Both acts were recorded in one instrument. It was thus, in fact, an instrument of resignation and sasine, but it was gener-

ally described as an instrument of sasine merely. The Act 1681, c. 11 (13), required these instruments to be recorded within sixty days of their date. The town clerk had the monopoly of acting as notary. He appended a long Latin docquet. He and the witnesses signed each page of the instrument.

In 1845 (8 & 9 Vict. c. 35) the only changes made were, that it was made optional to have the ceremony on the lands or in the council chamber: in the latter case the symbol was a pen; and in any case the docquet was dispensed with.

In 1847 the whole ceremony, and all symbols, and the intervention of the provost or a bailie, were all superseded. What was substituted was the presentation of the disposition to the town clerk, being a notary public, who thereupon subscribed and recorded an instrument of sasine in a simpler form. The town clerk prefixed his motto to his signature. The witnesses signed the last page only. The instrument might be recorded at any time during the life of the disponee.

In 1860 the instrument was superseded. The disposition was itself recorded, with a warrant. As a compensation to town clerks appointed prior to 8th March 1860, they were allowed to charge, for recording the dispositions, the same fees as they would have charged for preparing and recording an instrument thereon.

Briefly, then, the historical development in its outstanding features has been this:—

Prior to 1845 .	Ceremony on the ground and instrument of sasine.
1845 . . .	Ceremony simplified, but both ceremony and instrument retained.
1847 . . .	Ceremony abolished, but instrument retained.
1860 . . .	Instrument abolished, and disposition recorded *de plano*.

The next matter to be considered is the procedure in the making up of burgage titles in transmissions from the dead to the living. The outstanding peculiarity was, that where the ancestor died infeft, the bailies of the burgh were, at their own hand, entitled to ascertain and recognise the heir's right. The bailie himself conducted the inquiry, served and cognosced the heir, and gave him sasine. Before 1845 the ceremony took place on the ground of the subjects. The persons present were: (1) the bailie; (2) the heir or his procurator; (3) two or more witnesses; and (4) the town clerk. The bailie took the evidence of the witnesses on the point of propinquity (or this might be dispensed with altogether), and, if satisfied, gave possession by earth and stone and hasp and staple. The heir or his procurator entered the premises and shut the door; and immediately coming out again, took instruments in the hands of the town clerk as notary. One instrument was expede to establish the heir's propinquity and infeftment. It was called an instrument of cognition and sasine. The notary and witnesses signed each page. The instrument required to be recorded within sixty days of its date.

An alternative method was by special service before the Burgh Court, followed by sasine. It proceeded on the heir's claim without the necessity of any brieve from Chancery. There might, however, be such a brieve. If there was, there was also a retour; otherwise, not. A third alternative course was a simple writ of *clare constat* by the magistrates, followed by sasine, but this was of doubtful efficacy.

Dealing with the leading method, namely, entry by cognition and sasine, the 1845 Act allowed the ceremony to take place on the premises or in

the council chamber; in the latter case the symbol was a pen, and in either case the notary's docquet was dispensed with. But still the notary and witnesses signed each page, and the sixty days' limit for recording was retained.

No changes were made in 1847. The Burgage Tenure Act of that year was limited to transmission *inter vivos*, and the Service of Heirs Act of the same year was specially declared not to touch "the service and entry of heirs *more burgi*."

The 1860 Act did not abolish the old procedure, but practically it superseded it by an approximation to ordinary feudal forms, two new (or revived and adapted) alternative modes being provided, namely: (1) writ of *clare constat* by the magistrates, recorded with a warrant; (2) special service before the Sheriff of Chancery or Sheriff of the county in which the burgh is situated, the extract decree being recorded with warrant.

It would appear that entry *more burgi* is now *incompetent* in view of sec. 25 of the 1874 Act, which provides that there *shall not* be any distinction between feu and burgage as regards "the completion of titles." The somewhat inconsistent terms of the following section are limited to "conveyances."

The special power and monopoly to the bailies in the establishment of the heir's propinquity were limited to the case of the ancestor being infeft. If he died with a personal right only, the heir always required to expede a general service. That gave him right to the unexecuted procuratory of resignation in the ancestor's title, whereupon he resigned in the hands of the bailies as representing the Crown, and was infeft under an ordinary burgage instrument of sasine; or, after 1860, he would, and now will, proceed by notarial instrument.

Much doubt has been created by the provisions in the 1874 Act as to the register in which deeds are to be recorded which relate to feus of burgage property. The Act (s. 25) authorises future feus, and further provides as follows:—

> The titles of all such feus granted before the commencement of this Act shall be unchallengeable on the grounds that such feus are of land held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines. Writs affecting land which immediately prior to the commencement of this Act was held burgage, shall be recorded in the Burgh Register of Sasines.

There appear to be at least three questions, namely, In which register—county or burgh—are the following writs to be recorded?—(1) Transmissions after 1874 of a feu constituted before 1874 by registration in the Burgh Register of Sasines; (2) transmissions after 1874 of a feu constituted before 1874 by registration in the county register; (3) a feu-charter granted after 1874. Before dealing with these questions it is necessary to state that there is clear authority for the view that, though there was diversity of practice before 1874, the only correct method was to record feu-rights of burgage property in the county register (*Earl Fife's Trs.* v. *Mags. of Aberdeen*, 1842, 4 D. 1245). This is clearly recognised in the legislative relief given to the recording of such deeds in the burgh register, which implies that such relief is necessary,—that is, that such recording was wrong.

(1 and 2) *Prior Feus.*—It is generally taken to be the meaning of the Act that, as regards all feus constituted before 1874, wherever recorded, subsequent transmissions are to be recorded in the county register. We hold that this is correct. It is in the Act recognised, as above stated, that they ought always to have been recorded in that register, and the only

direction to record in the burgh register is limited to "writs affecting land which immediately prior to the commencement of this Act was held burgage," which was not the case in the instances supposed.

(3) As regards feus constituted after 1874, different views have been expressed. We hold that the burgh register is the competent, and the only competent, record. The proposal to support the opposite view by interpolating the words "other than feu-rights" in the sentence beginning "Writs affecting land," seems altogether inadmissible, as being a pure instance of begging the question. It is clearly provided that if the land was held burgage "immediately before the commencement of this Act," then the deeds must be recorded in the burgh register; and that is the case in the instances now under consideration. There is ample practical reason to support this construction as being the true meaning of Parliament, for it is very desirable that all deeds affecting the same property should be found in the same register.

Dependent upon these questions of recording is the matter of sasine searches. It is usually stated that when burgage property has been feued it is necessary to search in both registers. By that is meant that when the title tendered is a feu (before 1874) of burgage property, it is necessary to search, not only the county register, but also the burgh register, and that not only to the date of the infeftment on the feu, but also down to 2nd October 1874. The reason of that is, that even though the feu itself was recorded in the county register, a transmission of it, or a security over it, would be competently recorded in the burgh register. Instances are, in fact, known in which the steps in the same progress have been recorded indifferently in the two registers—some in the one and others in the other. But further, it is obvious that without a search in the county register it is impossible to say whether there has or has not (at least prior to 1874) been a feu granted; so that the correct rule is that, in order to be safe, it was and is necessary in *all* burgage titles and transactions to search both registers. In the last case the county search need only be to 1st October 1874, if the proper view has been stated above as to the effect of the 25th section of the Act. Another difficulty in burgage searches is that the town clerks are not bound to furnish them. When they decline to do so, private searchers must be instructed, often at considerable inconvenience.

There have never been any separate personal registers in connection with burgage property. The personal registers and searches are the same as if the property were a feu-holding.

It will be observed that the rubric of sec. 25 of the 1874 Act is, "Distinction between burgage and feu abolished." The language of the Act itself is somewhat contradictory, but there is certainly no *abolition* of burgage as a separate tenure, nor even of all differences between it and feu. It is true, however, that the only practical difference between burgage and modern feus is the existence of these separate burgh registers. It is much to be desired that they were superseded. In the first place, there is often a doubt whether the property is or is not burgage. To get over such doubts it is not uncommon to record in both registers. The evils of that are obvious. It increases expense, and causes delay, which means risk. The same objection arises in every case in which a deed embraces both feu and burgage property. In that case there must be double recording; and unless serious additional expense is to be incurred, there must be a considerable interval before a real right can be obtained to one or other of the properties. The difficulties and additional expense regarding searches have already been pointed out. On all these grounds,—uniformity, safety, despatch, and

economy,—any future reform should include the abolition of the burgh registers.

It is not unimportant to note that the term burgage was used to describe a similar tenure in England, and that there, as here, one of its leading characteristics was freedom of alienation (*History of English Law*, Pollock and Maitland, i. 276).

[Ersk. II. iii. 41, II. iv. 8; Bell, *Principles*, 685, 838; Menzies, *Lectures*, 786; Bell, *Conveyancing*, 3rd ed., 569, 652, 792, 1116; *Juridical Styles*, 1st ed.]

Burgess.—A burgess is a member of the corporation of a burgh who may be admitted as such either in virtue of the charter of erection of the burgh, or by birth, being the son of a burgess, or by serving an apprenticeship to a burgess, or by marrying the daughter of a burgess, or by election by the magistrates of the burgh. There were three kinds of burgesses, *i.e.* burgesses *in suu arte*, who were members of one or other of the corporations; burgesses who were guild brothers; and a third class, who were simply burgesses, and neither guild brothers nor members of any corporation (*Kilk. Hog.* 26 Jan. 1743, *Dict.* p. 1928). On admission the burgess takes an oath of fidelity to the Crown, and of faithful obedience to the provost and bailies of the burgh, and pays certain dues, upon which he receives an extract of his admission from the town clerk. Burgesses had, with the guild brethren, the exclusive privileges within the burgh of trade and manufacture, except on market days, when traders and manufacturers in the county or unfreemen in the burgh might sell their goods. By the Act 9 & 10 Vict. c. 17, s. 1, all exclusive trading privileges and rights were abolished, but the guilds and trades corporations still exist, with power to elect their own deacons and officers for managing their affairs (3 & 4 Will. IV. c. 76, s. 21). By sec. 2 of the Act (23 & 24 Vict. c. 47) the magistrates and council of any royal burgh are authorised to admit any person entitled to vote in the election of a councillor of such burgh to the status of a burgess thereof on payment of entry money not exceeding £1. By the Act 39 & 40 Vict. c. 12, it was intended that the law of Scotland should be assimilated to that of England respecting the creation of burgesses, the rights of the guilds and trades corporations in their own funds being expressly reserved; but the municipal systems of the two countries are very different. That Act provides that every person who is of full age, liable to be rated for the relief of the poor at the term of Whitsunday in each year, who has occupied any lands or premises within the burgh for a period of three years prior to the term of Whitsunday, and who during the time of such occupation has been an inhabitant householder within the burgh, and paid poor-rates during the period of such occupancy, shall be a burgess of the burgh so long as that person occupies the premises. No person being an alien or one who within twelve calendar months before the last term of Whitsunday has received parochial relief, or any pension or charitable allowance from the town council, or any corporate body within the burgh, can be a burgess so long as he continues to receive the pension. A female may, however, be a burgess, as the terms are "every person of full age," which does not exclude women. This does not confer upon a burgess so admitted any right or title to admission to any of the guilds or trades corporations, or any other benefactions connected therewith, or to any burgess acres or other burghal rights of property. The town clerk is the custodier of the register of burgesses. In England this is practically the electoral roll, but

in Scotland a register of municipal electors is made up in terms of the Municipal and Registration Acts. In virtue of their powers to admit burgesses under the Act 39 & 40 Vict., it has become customary for the magistrates in the larger towns to admit persons of distinction to the position of honorary burgesses. This is what is known as "conferring the freedom of the burgh." The names of such honorary burgesses are entered in the burgess list; but such burgesses are not entitled, when not resident or carrying on business within the burgh, to exercise the municipal franchise or be inducted to the town council.

The burgesses may sue the magistrates and council in vindication of their individual patrimonial rights, as well as to prevent special acts of maladministration with reference to the heritable property or the revenues of the burgh, but are not entitled to impugn the accounts of the property and revenues of the burgh, or to call the magistrates and council to a general accounting.—3 & 4 Will. IV. c. 76; Ersk. Bk. i. tit. 4, s. 21; Bell, *Prin.* 216; Marwick, 384, and cases there cited. See *Aitchison* v. *Magistrates of Dunbar*, 4 Feb. 1836, 14 S. 421; 11 F. 349.

Burgess or **Burgh Acres.**—Certain small patches of land of one or more acres, and sometimes less, lying either within or in the neighbourhood of royal burghs, and frequently forming part of the burgh-muir, which were usually feued out to and occupied by burgesses or their dependants resident in the burgh, were called burgess or burgh acres. Thus in the Records of the City of Edinburgh, 24 April, 1511, sasine is given to a burgess of a piece of waste land towards the burgh loch of the said burgh, the half of an acre of land for houses and buildings to be erected thereon between the lands of . . . . on the east and the lands of . . . . on the west. Also of one piece of arable land annexed thereto, lying towards the south, containing two acres and the half of an acre arable land, lying with the larger measure, because that piece is in part barren, and not so fertile and fruitful as the other lands lying thereabout. For every tenandry in the said muir should contain in whole three acres of land only to be built and cultivated, unless there be a reasonable cause of barrenness and unfruitfulness, according to the tenor of the charter to be made thereupon under the common seal of the burgh. On the same day sasine was given to fifteen other persons of similar acres, and numerous instances of the same kind occur throughout the Records. The controlling power and right of management of these, for the benefit of the community and burgesses, is vested in the magistrates and council, subject always to and consistent with the rights and titles of the respective parties (*Magistrates of Lauder*, 17 May 1821, 1 S. 17 (N. E. 13); 1 F. C. 13). A burgess under the Act 39 & 40 Vict. c. 12 does not acquire any right or interest in the properties, funds, or revenues of the guilds, crafts, or incorporations of the burgh, or to or in any burgess acres or grazing rights connected therewith. The Act of Parliament 1695, c. 23, for the division of runridge lands, excludes burgh acres from the effects of the Statute. This exception, however, relates only to royal burghs, and does not extend to burghs of barony (*Douglas*, 22 Jan. 1777, Bro. Supp. 581; Bell, *Prin.* s. 1099).

Burgh, Parliamentary.—By the Act 2 & 3 Will. IV. c. 65, intituled an Act to amend the representation of the people in Scotland, the right of sending, or contributing to send, members to Parliament

was conferred on certain burghs and towns which were not royal burghs. Twenty-three Members of Parliament were allotted to the several burghs and towns, or districts of burghs and towns, enumerated in the Act. The burghs thus enfranchised came to be known as Parliamentary Burghs. By the Act 3 & 4 Will. IV. c. 77, on the preamble that in some of those burghs and towns there are no proper magistracy or councils, and the constitution of such magistracies and councils, and the mode of electing the same where they do exist in such burghs or towns, is defective, provision was made for the due appointment and election of magistrates and councils in these burghs. The burghs upon which these rights were conferred are mentioned in a Schedule to the Act, and are: Paisley, Greenock, Leith, Kilmarnock, Falkirk, Hamilton, Peterhead, Musselburgh, Airdrie, Port-Glasgow, Cromarty, Portobello, and Oban. For each of the burghs a certain number of councillors was appointed to be chosen; for some sixteen, others twelve, others nine, and for Oban six. This is still operative, except in so far as amended by the Acts 15 & 16 Vict. c. 32, and 31 & 32 Vict. c. 108, s. 11. The election to be made by the persons qualified to vote for a Member of Parliament, in Paisley, Greenock, Leith, and Kilmarnock, was to be made by open poll in one day, the polling books being summed up, and the result declared by the Provost. In Falkirk, Hamilton, Musselburgh, Airdrie, Port-Glasgow, Peterhead, Portobello, Cromarty, and Oban, the election was to be made by signed lists. The system of voting by open poll and signed lists has now been entirely superseded by that of voting by ballot, as provided by the Ballot Act.

In parliamentary burghs the right of electing the town council practically belongs to the same class of persons possessed of the like qualifications to vote as in royal burghs. By the Act 3 & 4 Will. IV. c. 77, s. 30, it is provided that the magistrates and councils to be elected for the burghs under the authority of that Act shall have such and the like rights, powers, authorities, and jurisdiction as is or are possessed by the magistrates of any royal burgh in Scotland, and such rights, powers, authorities, and jurisdiction shall extend equally over every part of the limits of such burgh, but they shall not have the power of trying for crimes punishable by death or transportation; and such rights, etc., are in no case to be exclusive of the authority and jurisdiction of any Admiralty or Dean of Guild Court, or of the Sheriff or Justices of the Peace of the county over the territory within the boundaries of such burghs. [Bell, *Prin.* s. 2161; Marwick, *Municipal Elections.*] See BURGH, ROYAL: BURGH, POLICE.

Burgh, Police.—Populous places which have been formed into burghs under the Police Acts are popularly known as police burghs. In virtue of the General Police (Scotland) Act, 1862 (31 & 32 Vict. c. 102), any seven householders of a populous place, consisting of more than 700 inhabitants, might apply to the Sheriff to fix its boundaries for the purposes of that Act. If that were done, the Sheriff, on the application of a like number of householders, convened a meeting, at which he presided, to consider whether or not the Act should be adopted. If the meeting was against adopting the Act, the question could not be raised again for another year. If the meeting were in favour of adopting, it fixed the number of commissioners, not being more than twelve, nor less than six, and whether the burgh was to be divided into wards, and if so, the limits of the wards. If there were a division, a poll might be held. If there were no division, or if the poll resulted favourably for the adoption of the Act, then the Sheriff caused

the resolution to be recorded in the Sheriff Court Books, which was then final, and the effect of which was to form the populous place into a burgh under the Act. Many of the populous places in Scotland took advantage of that Act. In 1892 the Burgh Police (Scotland) Act was passed, which repealed the Act of 1862, but in which similar provisions are made. By sec. 9 it is provided that the boundaries of any populous place may, for the purposes of the Act, be fixed by the Sheriff on the application of any seven householders; and if the population be 5000 or upwards, the Sheriff may divide the place into wards, and fix the limits of the wards.

Householder is, for this purpose, any occupier of lands or premises whose occupancy qualifies him to vote for a member of Parliament for a burgh, and includes any female occupier who is entitled under the Municipal Elections Amendment (Scotland) Act, 1881, to vote at municipal elections. The Sheriff directs notice of the application to be given in the *Edinburgh Gazette*, and in some newspaper circulating in the county in which the populous place is situated, and appoints a day, not less than two weeks after the last date of the notice, for hearing parties interested. After hearing all parties interested, the Sheriff determines whether the area included in the application, or any part thereof, is suitable for being formed into a police burgh; and if satisfied that it is, he defines in a written deliverance on the application the boundaries of the burgh, and, if necessary, the limits of the wards. In the Police Act of 1892, no provision was made for holding a meeting and taking a poll, as provided by the 1862 Act; but by the Burgh Police (Scotland) Act, 1893 (56 & 57 Vict. c. 25), this was remedied, and by subsec. 1 of sec. 2 thereof it is provided that where the boundaries of a populous place have been defined, the Sheriff, on the requisition of any seven or more householders, accompanied, if the Sheriff requires, by a satisfactory undertaking to pay expenses, convenes a meeting of the householders for the purpose of considering whether the provisions of the 1892 Act shall be adopted and carried into execution, and the populous place declared to be a burgh. The meeting is to be held not less than twenty-one, nor more than thirty days, after the date on which the Sheriff receives the requisition; and the meeting and the purposes thereof must be duly advertised in a newspaper circulating in the populous place, and by posting handbills in the form of a schedule annexed to the amending Act. The meeting must be held in a convenient place fixed by the Sheriff, who attends and presides, and a clerk appointed by him to take notes of the proceedings. The meeting determines whether the Act shall be adopted, or may appoint a committee of its number, not exceeding nine, to inquire and report to a future meeting. The Sheriff ascertains the determination of the meeting by a show of hands, or in such other manner as he thinks proper; and in the case of equality of votes he has a casting vote. The determination of the meeting is final, unless a poll of householders is then demanded in writing by seven persons present and qualified to vote. If a poll be demanded, the Sheriff directs it to proceed at such polling-places and on such date as he fixes, not more than seven days from the date of the demand, between the hours of 8 A.M. and 8 P.M. The Sheriff acts as returning officer, and appoints a presiding officer and polling clerks, and poll or ballot books are prepared in the form of the schedule annexed to the Act. The voting is by ballot, subject to the regulations issued by the Secretary for Scotland. After the close of the poll the ballot-boxes are sealed up and transmitted to the Sheriff, who declares the result at an adjourned meeting. The declaration is final, unless any householder at the meeting demand a scrutiny, which may be given by the

Sheriff on caution being found for expenses. The resolution to adopt the provisions of the Act is effectual if carried by a majority of the persons qualified and voting; and the Sheriff may find and declare either that the Act has or has not been adopted; and if it be adopted, he shall declare that such populous place is a burgh, which declaration is recorded in the Sheriff Court Books of the county, and reported to the Secretary for Scotland.

Any owner or occupier within the boundaries fixed by the Sheriff who considers himself aggrieved by the deliverance or the resolutions, or the county council, or the standing joint committee of any county into which the boundaries extend beyond the existing boundaries, may within fourteen days from the date of the deliverance present a petition against the same to the Court of Session, setting forth the grounds on which they object to the deliverance. After answers have been lodged, the Court may either pronounce a final order or remit to a Lord Ordinary to direct inquiry, and to issue such order as he may deem requisite to determine the boundaries of such burgh: and such order shall, in either case, be final, and when recorded in the Sheriff Court Books of the county, fixes the boundaries of the burgh for the purposes of the Act.

In burghs where the population is less than 10,000, the number of commissioners elected is nine, unless the Sheriff see cause to fix the number at twelve. Where the population is between 10,000 and 20,000, twelve; between 20,000 and 50,000, fifteen; 50,000 and 100,000, eighteen; and over 100,000, twenty-four,—but by the amending Act of 1894 (57 & 58 Vict. c. 18), where the population is between 50,000 and 100,000, the number is from eighteen to twenty-four. The commissioners meet at twelve o'clock the first Friday after the first election, and elect magistrates of police. Where the population is 50,000 and upwards, a chief magistrate and six other magistrates; where it is 10,000 and 50,000, a chief magistrate and four other magistrates; and where the population is less than 10,000, a chief magistrate and two other magistrates. The chief magistrate is to be called provost, and the magistrates, bailies. The commissioners are a body corporate, having a common seal, and are authorised to appoint clerks, treasurers, collectors, surveyors, inspectors, and all other persons necessary to be employed in the execution of the Act, and to remove and suspend such at pleasure. They have various other powers too extensive to enumerate here, and for which reference must be made to the Act itself. By the 454th clause of the Act, the magistrates of police of a burgh, or any one or more of them, has jurisdiction within the burgh, and power to take cognisance of all crimes, offences, and breaches of police regulations in the Act, or contained in any other Act in force in the burgh, or of any bye-laws made in virtue of the Act, or any offences against the Public Parks (Scotland) Act, 1878, or bye-laws made in virtue thereof, and of any other crimes or offences punishable by any public, general, or local Statute or common law which is within the jurisdiction of the magistrates of any royal burgh. The magistrates have also by that clause the like jurisdiction within the burgh, as any magistrate of a royal burgh, or any Dean of Guild of a royal burgh has by the law of Scotland, and all jurisdiction to try offences and award punishment conferred on any justice of the peace, or two justices of the peace, or any magistrate by any Act, public or local, passed or to be passed, or any bye-laws, orders or regulations made in virtue thereof, and in force in the burgh, but their jurisdiction does not extend to the trial of offences against any of the Inland Revenue or Custom Acts (see *Tainsh*, 24 Jan. 1877, 4 R. 315; *Johnston*, 25 Mar. 1876, 3 Coup. 250). [See Marwick on *Municipal Elections*; Campbell Irons on *The Burgh Police Act*.] See BURGH, ROYAL.

Burgh, Royal.—A royal burgh is a corporate body or legal person erected by a charter from the Crown, and holding its rights, lands, and privileges direct from the Crown. The charter in favour of the burghs may be either an actual express existing writ, or its existence is sometimes assumed from other facts and circumstances, on a presumption that the original has perished by accident. The charter does not necessarily require, nor probably even admit of sasine, but the fee is always full. The corporation consists of the persons in whose favour the charter is granted, being generally the magistrates and burgesses or residents within the territory defined by the charter. The royal burghs were almost invariably invested with power by their charters to choose annually such office-bearers or magistrates as were specified in the grant, being generally a provost, bailies, dean of guild, and treasurer, with a common council. The manner of their election was long regulated by the Statute 1469, c. 30; but nearly every burgh had a set or constitution proper to itself, which often contained special provisions, according to which the magistrates or council were elected. The right of appointing their successors was vested in existing councils by the Statute 1469, c. 5, which provided that when the new council was chosen, the members thereof, along with the old council, should choose the office-bearers of the town, as deacon, bailies, dean of guild, etc.; and that each craft should choose a member thereof, to have a voice in the election of the office-bearers. In this matter, also, various sets of the burghs differed in many points of detail, but agreeing generally in the principle of self-election. The election of councillors was altered by the Act 3 & 4 Wm. IV. c. 76, whereby the popular system was introduced of giving to all male residenters within the burgh or seven miles thereof the right of voting in the election, provided they possessed the necessary qualifications.

The provisions regulating the election will be found in that Act, and in the Municipal Elections Amendment (Scotland) Acts of 1868 and 1870 (31 & 32 Vict. c. 108, and 33 & 34 Vict. c 92). The right of electing the town council is vested in all persons who are qualified in respect of premises within the burgh to vote in the election of a member of Parliament for the burgh by virtue of the Reform Act of 1832 or the Reform Acts of 1868 and 1884, and who are duly registered as voters in the registers then in force for the time, made up in terms of the Registration Acts. The voting is by ballot. See BALLOT; MUNICIPAL ELECTIONS (PROCEDURE AT); FRANCHISE; REGISTRATION OF ELECTORS.

By the Act 44 & 45 Vict. c. 13, unmarried women or those not residing with their husbands, if qualified in like manner with men, and whose names appear on the register, may vote in such elections; and by the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, s. 11), a woman otherwise possessing the qualification for being registered on a Municipal or Parish Council Register is not disqualified by marriage from being so registered, provided that a husband and wife be not both registered in respect of the same property. The election takes place on the first Tuesday of November in each year. For convenience in elections, burghs may be divided into wards, regard being had to the number of town councillors in the burgh to the number of municipal electors, and to the value of the property as appearing on the Valuation Roll. The provisions regarding such division and the mode of carrying it out will be found in the Act 31 & 32 Vict. c. 108, as amended by 39 & 40 Vict. c. 25, and the Burgh Police (Scotland) Act 1892. On the division being duly made, the qualified electors in all such wards whose names are on the roll of electors of the burgh in force for the time being, are entitled to vote in the election of councillors for the burgh for as many

qualified persons to be councillors for such wards respectively as have been duly fixed and appropriated to such wards, and fall to be elected.

The councillors are chosen from the electors resident or personally carrying on business within the limits of the royalty, or where the municipal boundaries have been extended within these; but women, though qualified to vote, are not eligible for the office. Where there is a body of burgesses in the burgh, each councillor must produce evidence of his being a burgess before his induction into office. The newly-elected councillor may, however, pay the burgess dues after his election, provided this is done before he takes the oath and is admitted as councillor (23 & 24 Vict. c. 47, s. 2). In the case of several of the burghs the number of councillors is fixed by Statute 3 & 4 Will. IV. c. 76, and 15 & 16 Vict. c. 32, while in others the set or usage of the burgh regulates this. One-third, or a number as near thereto as practicable, of the whole council of every burgh goes out of office annually on the first Tuesday in November, and the third which falls to retire consists of the councillors who have been longest in office. The councillors who retire may be immediately re-elected. Where there is not a sufficient number of councillors three years in office to constitute the one-third of the council to go out, the deficiency is to be made up by selecting from the next younger class of councillors, and the principle of selection is that it is the member or members of that younger class who had the smallest number of votes who is to be taken; and in the case of an equality of votes or no contest, the council is to decide (*Thomson*, 1874, 3 R. 451, per Lord President Inglis). Vacancies occurring during the year by resignation, death, or disability, are supplied *ad interim* by the remaining members of the council, the chief or senior magistrate having a double or casting vote in case of equality. The person elected *ad interim* holds office only till the first Tuesday of November immediately following his election. Where an election has been declared null or irregular, application may be made by one or more resident electors to the Court of Session to grant a warrant for a new election of councillors, and thereupon the election must proceed in the same manner as is provided for the annual election of councillors in the burgh (16 Vict. c. 26). No election of councillors can competently be set aside unless the challenge is brought within a month from the date of the election (*Drew*, 1854, 17 D. 51). It is competent to suspend and not necessary to reduce such an election, if the councillor has not taken the oath and been inducted (*Monteith*, 1837, 16 S. 122, 13 F. 118); but suspension is incompetent after he has been sworn in and acted for some time in his official capacity (*Magistrates of Glasgow*, 1825, 4 S. 266, N. E. 271). On the third lawful day after the election of the councillors, they meet and elect from among their own number, by a plurality of voices, a provost or chief magistrate, the number of bailies fixed by the set or usage of the burgh, a treasurer, and other usual and ordinary office-bearers existing in the council, in so far as there are vacancies, as well as to appoint the managers of any charitable or public institution whose appointment is vested in the magistrates and council. The election of magistrates is a statutory duty, and the Court will ordain its proper performance where the Council either fails or neglects to make the election (*Herron*, 1830, 7 R. 497). "Plurality of voices" means a majority of the meeting electing, and the proper way to obtain this is to strike off the candidate who has the fewest votes, and to follow out this course until no more than two remain, the votes between whom will be decisive. A vote by ballot is illegal (*Watson*, 1832, 10 S. 480, 7 F. 370). Suspension and interdict has been held competent to try a question as to the election of a bailie when

intimated before the oath is taken or the seals of office assumed (*M'Culloch*, 1 D. 529, 14 F. 619). In practice it is usual to designate the bailies first, second, third, and fourth, according to the priority of their election; but this is mere matter of convenience, and confers no superior legal rights. The provost or chief magistrate and the treasurer are entitled to remain in office for a period of three municipal years from the time of their appointment to these respective offices (3 & 4 Will. IV. c. 76, s. 24). By that Act the right of the guildry, trades, etc., to elect their own Dean was preserved; but they are not now official or constituent members of the council, their functions being performed by a member of council elected by a majority thereof. In Edinburgh and Glasgow the Conveners of the Trades and the Deans of Guild, and in Aberdeen, Dundee, and Perth, the Deans of Guild, are *ex officio* members of council. The electors of these burghs choose such a number of councillors as, together with these officers, completes the number of the council. By sec. 320, 46 & 47 Vict. c. 52, it is provided that if a person is adjudged bankrupt he is disqualified from holding certain offices, and by 47 & 48 Vic. c. 16, s. 5, it is provided that in the application of that Act to Scotland, adjudged bankrupt shall include the case of a person whose estate has been sequestrated, or with respect to whom a decree of *cessio bonorum* has been pronounced by a competent Court. The disqualification applies to such a person being elected to, or holding, or exercising the office of Provost, Bailie, Treasurer, Dean of Guild, Deacon, Convener of Trades, or Councillor, or Commissioner, or Magistrate of Police; and if such bankruptcy occur during his holding of office, it thereupon becomes vacant (see *Thom*, 1885, 12 R. 201). It is incompetent for a magistrate or town councillor during his term of office to be appointed town clerk. A magistrate is not responsible for the debts of the burgh or the acts of his predecessors, otherwise than as a citizen or burgess. The existing council in all royal burghs must each year make up, on or before 15th October, a state of the affairs of the burgh, to be kept in the Town Clerk's or Treasurer's office, and open for inspection to the municipal electors. The senior magistrate of the royal burgh has, since the Union, been in use to be named in the Commissions of the Peace. The magistrates had right, with consent of the majority of the burgesses, to impose certain small taxes or duties on the inhabitants for the use of the burgh, and also the power of apportioning some of the taxes imposed by Parliament, but such powers are now almost entirely replaced by Statute. A Convention, composed of commissioners from each of the royal, parliamentary, and such police burghs as have been admitted, meets annually at Edinburgh, which had power to make regulations for promoting the trade and common weal of the burghs, and ascertain how their annual revenues had been applied. See CONVENTION OF ROYAL BURGHS.

By the Act 1663, c. 6, and subsequent Statutes, the provost and bailies of royal burghs have power to value and sell ruinous houses when the proprietors refuse to rebuild or repair them. Many other enactments are to be found in the Acts of the Scottish Parliaments regulating the trade in royal burghs, and defining the privileges of the magistrates and burgesses, but most of which have now fallen into desuetude (See Kames, *Statute Law (Abridged)*, art. Burgh, Royal). Magistrates are competent to judge in petty riots; and in Edinburgh, Glasgow, Perth, and some other royal burghs they had a cumulative jurisdiction with the Sheriff in blood wits. Their criminal jurisdiction is now, however, practically limited to police offences, and is regulated by the various Police Acts in force in Scotland, and the Summary Procedure Acts. There are sixty-six royal burghs in Scotland.

[Stair, iv. 47, 19; More's *Notes*, clxxi.: Bankt. II. 562–577; Ersk. i. 4, 22, 23; Bell, *Prin.* ss. 838 *et seq.*, 2164 *et seq.*; Marwick on *Municipal Elections*: Campbell Irons, *Burgh Police*.]

Burghs of Barony and Regality.—A burgh of barony or a burgh of regality is a corporation consisting of the inhabitants of a determinate tract of territory within the barony erected by the king, and subject to the government of magistrates. The right of electing magistrates is vested by the charter sometimes in the inhabitants themselves, and sometimes in the baron, their superior. Whatever jurisdiction belongs to the magistrates of the burgh, the superior's jurisdiction is cumulative with it, as the territory granted to the body corporate continues as truly a part of the barony as if it were the property of a single vassal, differing only in that the jurisdiction is in the first case exercised by a community, and in the other by one person. The same rule holds in burghs of regality, both as to the manner of incorporating them and as to the superior's cumulative jurisdiction. Where such burghs are not parliamentary burghs, the list or register of persons entitled to vote in the election of councillors, where these are not nominated by the superior, is made up in the manner prescribed by the charter or the Statute by which such burgh has been erected, or under which its affairs are administered. Where the charter or Statute does not contain such directions, the election should, as far as practicable, be conducted in terms of the provisions regulating the election of councillors for royal burghs which do not send a member to Parliament. In a case where a burgh of barony was in use to elect its magistrates and council, in terms of its Crown charter, in September every third year, the electors being the male owners and tenants of subjects yielding £10 annually, the General Police Act, 1862, was adopted in the burgh in 1863; but the elections continued to be conducted in the burgh under the charter, the last having been held in September 1888.

In November 1891, after the date of election for that year under both the charter and the Police Act had passed, the Court was asked to ordain the town clerk of the burgh to make up the roll of electors in terms of the General Police Act, 1862, and subsequent Statutes, and to appoint a returning officer to hold the election under the provisions of the Ballot Acts. The Court declined to do more under the petition than appoint a returning officer (*Town Council of Stromness*, 1891, 19 R. 207).

Burial.—Scots law places no restrictions on the method of disposing of the bodies of the dead, save those involved in sanitary law and the law of nuisance. In the case of burial, the relatives are free to determine the place and the manner of sepulture. There is no law requiring that parishioners be buried in their own parish, as there was in canon law (cf. *Duddingston*, 1832, 10 S. 196). But the remains are sacred wherever they are interred; and so a grave is protected against disturbance, at least until "the process of disintegration is complete" (*Mansfield*, 1824, 2 Sh. App. 104). There are two exceptions to this rule: (1) If those having the management of a public burial-ground are compelled to disturb the grave from considerations of necessity or high expediency (*Steel*, 1891, 18 R. 911); or (2) if the burial was in ground in which there was no right of burial (*Officers of State*, 1823, 2 S. 437; affd. 1 W. & S. 533); in these cases disinterment appears to be permissible, on condition that the remains be

reinterred with all decency and respect. In other cases authority to disinter and reinter may, on cause shown, be obtained from the Court of Session or (more usually) from the Sheriff (*Mitchell*, 1893, 20 R. 902). Violating graves is a crime (see VIOLATING SEPULCHRES).

There are certain statutory provisions as to burial:—

(1) Under the Capital Punishment Act, 1868 (31 & 32 Vict. c. 24, ss. 6 and 13), the body of every offender executed is to be buried within the walls of the prison in which he has been executed, or, if there is no space therein, in such other fit place as the Secretary for Scotland may appoint.

(2) It is the duty of the local authority under the Public Health Acts "to bury any dead body found within the district and which is unclaimed, or which no sufficient person undertakes to bury" (30 & 31 Vict. c. 101, s. 43).

(3) When a dead body is retained in a house in such a state as to be injurious to the health of the inmates, a magistrate or justice may, on a certificate signed by a legally qualified medical practitioner, direct it to be buried within a limited time (*ib.*)

(4) When the provisions of the Public Health Acts for the prevention of diseases are put in force, the Local Government Board for Scotland may issue regulations requiring speedy interment of the dead (30 & 31 Vict. c. 101, s. 35).

Bursary.—An endowment for the maintenance of a student in a Scottish school or university, and equivalent to the English "scholarship" or "exhibition." The institution of bursaries is to be traced to the Reformation. "Bursar" was then the name given to a poor student at a Scottish university. One effect of the Reformation was the suppression of certain benefices or ecclesiastical livings, instituted for the use of the founders, namely, for the service of religion to them and their families. As these had proceeded purely from the bounty of the patron, they were not annexed to the Crown at the Reformation; but while reserved, along with the right of presentation, to the patrons and their heirs, they were bound by Statute to apply the revenues arising from such benefices to the support of "bursars" (Ersk. i. 12). In the present century many bursaries have been founded by private individuals. The Court has also, in the exercise of its *nobile officium*, sanctioned the institution of bursaries in cases of trust administration, where it has considered a deviation from the original scheme warranted by the fact that it was no longer possible or expedient to apply the funds, or part of them, to the purpose mentioned by the truster (*Burnet's Trs.*, 1876, 4 R. 127; *M'Dougal* (*Carr's Trs.*), 1878, 5 R. 1014; but see *Govrs. of Bell's Trust*, 33 S. L. R. 591). Similarly, bursary trustees have been allowed to alter the regulations made by the founder. See *University of Aberdeen* v. *Irvine*, 1869, 7 M. 1087, where bursaries had been founded under a deed of mortification, and it was held that the Court was entitled to increase the number of bursars as well as the amount of the bursaries, but that any departure from the number of bursars specified in the deed of mortification could only be justified by the consideration, that to carry out the will of the founder according to its letter would be either inconsistent with the main design of the founder himself, or in itself mischievous (cf. *M'Kendrick and Others (Trs. of the "John Reid Prize")*, 1894, 20 R. 939). The Court has refused to interfere with the bursary award on the ground that the unsuccessful candidate, who was suing, could not aver any breach of

contract (*Martin*, 1885, 13 R. 274). A candidate in a bursary competition who avers that another has been unduly preferred, is not entitled to claim damages for the loss of the bursary. A claim for damages rests on delict and not on contract, and will not be recognised unless supported by clear and articulate averments of pecuniary loss out of entering the competition. Nor, when in point of fact he was not elected to the bursary, can an unsuccessful candidate succeed in getting a decree for declarator that he was elected, and for payment (*M'Donald*, 1890, 17 R. 951.) The proper mode of pleading would be to have a reductive, as well as a declaratory, conclusion. See *M'Quaker*, 1891, 18 R. 521. In this case the award of a school bursary, made by the Governors after examination, was reduced, and the pursuer found entitled to it. The case, however, turned upon the interpretation of a clause in the regulations for the competition.

The Scottish University Commissioners, appointed under the Universities (Scotland) Act, 1889, have made certain regulations as to bursaries, scholarships, and fellowships, and these will be found in Ordinances Nos. 57 and 58 issued by them. [For Form of Presentation to a Bursary, and Form of Deed of Mortification, see *Juridical Styles*, ii. 61 and 633.]

Burying-Place.—As there is no restriction on the right of burial, it falls within the uses to which anyone may dedicate his property. But from considerations originally of a sacred character, now mainly sanitary, it has been recognised as a public necessity that facilities for burial should be brought within the reach of all, and accordingly the duty was imposed on parochial authorities of providing kirkyards or burial-grounds, in which the public of the parish should have the right of sepulture. Burying-places may thus be either private or public.

I. Private Burying-Places.

1. There is no restraint on a person setting apart a portion of his ground as a family burying-place, or a mausoleum, unless it can be shown to involve injury to public health, or to be a nuisance to neighbouring proprietors (cf. *Swan*, 1830, 8 S. 637). Such a burying-place is not a burial-ground in the sense of the Burial-Grounds Act, 1855 (18 & 19 Vict. c. 68), so as to require the consent of owners of houses within a hundred yards of it (*Bain*, 1884, 12 R. 62). Scots law (differing from the Roman law) does not recognise every place used for burial as *res religiosa* and incapable of commerce (Craig, I. xv. 11; Ersk. II. i. 8; Bankt. I. iii. 12, and II. viii. 194). A private burying-place of this description may be dealt with by the owner like any other private property, with this sole condition, that, except for some good cause, the grave shall not be disturbed until the process of disintergration is complete. If it must be disturbed, the remains should be reinterred with all care and reverence (see *Officers of State*, 1823, 2 S. 437, affd. 1 W. & S. 533).

2. Cemeteries in which individuals acquire the right of burial by contract are private burying-places. In the *Dalkeith* case (1832, 10 S. 196) declarator was sought that no other persons than the heritors and kirk session "were entitled to establish within the parish a place of common sepulture." Declarator was refused, L. Mackenzie stating that there is no Statute, decision, or dictum to suggest any illegality in the formation of private cemeteries, or letting out the use of them for price or hire. In an attempt to interdict the formation of a cemetery on the ground of nuisance, the case was remitted to a jury (*Swan, ut supra*). The rights of parties con-

tracting as to the privilege of sepulture in a cemetery are regulated by the ordinary law of contract, they being free to make what bargain they please. The ordinary stipulation is for "a right to the exclusive use of a piece of ground for a burial-place, tomb, or grave, either in perpetuity or for a limited period" (*Edinburgh Southern Cemetery Co.*, 1889, 17 R. 154). When the terms of the contract are left to implication, they include the following (*Cunningham*, 1871, 9 M. 869, per L. Gifford, Ordinary, 875 *et seq.*):—(1) The lairholder does not acquire an absolute right of property. This remains with the persons feudally vested in the ground. But the lairholder acquires the right to use in perpetuity the allocated lair for the sole purpose of sepulture. (2) The cemetery is held to be dedicated exclusively as a burial-ground. The lairholder can restrain attempts to make any other use of it, or to erect any building in it foreign to the purpose of a burial-ground (see *Paterson*, 1845, 7 D. 561). (3) Fair and reasonable fees may be charged for interment, but lairholders are entitled to prevent the imposition of extortionate or unreasonable charges. (4) The cemetery must be maintained in proper and suitable condition, and lairholders are entitled to stop any practice of conducting interments in an offensive or insanitary manner. Every lairholder has a title to sue for vindication of his own rights, but a portion of them cannot sue in the name of the whole. They are not entitled to require the proprietors of the cemetery either to denude, as soon as the lairs are all disposed of, or to transfer the management to a committee of lairholders (*Cunningham*, *ut supra*). In the case of *Paterson* (*ut supra*), lairholders were refused interdict against the erection of a cenotaph to the memory of the Political Martyrs of 1793–4, it being a monument essentially of a sepulchral and solemn character, and there being nothing unseemly or contrary to public decency in the erection. There is no law to prevent the erection of a monument to men as to whose merits there is diversity of opinion.

In a recent case (*Wright*, 1881, 9 R. 15), where a grave had been purchased with the funds of the deceased, and his mother had erected a tombstone, it was held that the deceased's executor was not entitled to remove this tombstone. The decision proceeded rather on the obvious unseemliness of disturbing graves, than on any consideration of the precise rights of the executor in the lair.

2. Public Burying-Places.

These are burying-grounds in which all inhabitants of a particular district have the right of sepulture. They are mainly of two classes—kirkyards, and burial-grounds provided under the Burial-Grounds Act, 1855. There appears, however, to be a third class, where long use has conferred rights of burial on the public of a district. Restalrig burial-ground (a pre-Reformation one), though not the parish churchyard, was one in which the inhabitants of the district had the right of burial (*South Leith*, 1832, 11 S. 75). It was managed by a Friendly Society, surplus funds being devoted to pious uses in the district. In the *Beauly* case it appeared that by immemorial usage the inhabitants of the district had acquired the right of sepulture in Beauly Priory (*Locat*, 1845, 8 D. 316).

1. *Kirkyards.*—From early Christian times burial in or near the church was desired, from motives of religion (Duncan, *Par. Ecc. Law*, ch. xv.). The General Assembly passed an Act forbidding burial within churches (*ib.* s. 75), but there is no statutory prohibition. At one time the patron seems to have been entitled to a burial-place in the church. No right of burial in a church would now be recognised unless in respect of

immemorial usage (Ersk. I. v. 13). A family burial-place in a church is transmissible *specifice* by disposition (*Monteith*, 1695, 4 Bro. Supp. 261); and the opinion is expressed by Erskine (II. vi. 11) that it would be carried by a grant of the lands, in virtue of the clause *cum pertinentiis*. This does not hold of a family burial-place in a churchyard (*Steel*, 1891, 18 R. 911).

(1) The duty of providing and maintaining kirkyards lies on the heritors. Prior to the Reformation they were provided by the clergy, who recouped themselves out of the burial fees. After the Reformation the duty of providing kirkyards appears to have been regarded as one *ejusdem generis* with that of providing church, manse, and glebe; and accordingly, although the obligation was not imposed by Statute, it was accepted by the heritors, and has been repeatedly recognised by the Court as binding (*Greenock*, 1777, Mor. App. Kirkyard, 1; 5 Bro. Supp. 414; Hailes, 758; revd., on point of pleading only, 1779, 2 Pat. 486; *South Leith, ut supra*, etc.). As the kirkyard must be large enough to receive the bodies of all dead parishioners whose relatives wish them to be buried there (*Duddingston* case, *ut supra*), the duty of the heritors extends to enlarging it when necessary. There is statutory obligation on them to build and maintain the kirkyard dykes with stone and mortar to the height of two ells (1563, c. 76, and 1597, c. 232). The heritors are not relieved of the obligation to enlarge, by transferring the kirkyard to the Parish Council (57 & 58 Vict. c. 58 s. 30). The procedure is the same as in providing for the erection and maintenance of churches and manses and the designation of GLEBES (*q.v.*). When the necessity arises, it is for the heritors to consider the matter, and to take steps to provide a kirkyard, or suitable ground as an addition to the existing kirkyard. It is in the first instance furnished by the heritor who has ground suitable for the purpose, and he is indemnified by the whole body of heritors (himself included), each bearing a share in proportion to the value of his property (*Greenock, ut supra*). When ground has been thus provided, the heritors may apply to the Presbytery to designate it as the kirkyard, or as an addition thereto (*Duncan, ut supra*). If the heritors fail to do what is necessary, the Presbytery may interpose to do so, on the representation of anyone having an interest (*Walker*, 1876, 3 R. 498, affd. 1876, 4 R. (H. L.) 1). When the Presbytery, after the usual procedure, has selected suitable ground, it has been suggested that they should vindicate the ground from proprietor and tenant by action of declarator, in which all the heritors, the tenant of the ground, and probably the kirk session, ought to be called as parties (*Greenock, ut supra*, 2 Pat. 486). Within twenty days of the Presbytery's judgment, an appeal may be taken to the Sheriff, whose judgment, in turn, may be appealed within twenty days to the Lord Ordinary in Teind Causes (Ecclesiastical Buildings Act, 31 & 32 Vict. c. 96). But the Court of Session has no further jurisdiction in such matters, except that implied in its function of redressing any violation by an inferior Court of the ordinary rules of procedure common to all Courts (*Walker, ut supra*). The Court of Session, sitting as Commissioners of Teinds, have no power to fix a new churchyard for a parish (*Maitland*, 1766, Hailes, 109).

There may be constructive appropriation of ground as part of a kirkyard by acquiescence in its use for burial (*Philorth*, 1666, Mor. 5620; *Mansfield*, 1824, 2 Sh. App. 104).

"The churchyard belongs to the heritors, subject to the single burden of interring the dead" (L. Hailes in *Greenock, ut supra*; cf. *Cunningham*, 1778, 5 Bro. Supp. 415; *Hill*, 1863, 1 M. 360; *Russell*, 1882, 10 R. 302; *Bain, ut supra*; *Steel, ut supra*). They are proprietors in trust, and their powers are conditioned by the requirements of the trust. They are owners of the trees

in the kirkyard, and of the strata underneath; and may, it is thought, utilise these, so long as the purposes of the trust are not interfered with (Dunlop, *Par. Law*, 84; Rankine, *Land-Ownership*, 3rd ed., 171). But it appears that any profits arising from such dealings must be applied to parochial uses, in the same way as profits from interment fees, etc. The beneficiaries are the inhabitants of the parish, including heritors who have a residence in it, and their right is that of burial in the kirkyard on their decease. None others can claim the right; but the bodies of strangers may be interred with the heritors' consent (*Cunningham*, 1778, *ut supra*).

(2) The heritors have the regulation and management of the kirkyard (*Ure*, 1828, 6 S. 916; *Hill*, *ut supra*). They may devolve these duties on others, and frequently do so, the kirk session in many cases having the actual management. Where they permit anyone—minister, heritors' clerk, beadle—to allocate lairs on their behalf, they are bound by the actings of these individuals (*Wilson*, 1859, 21 D. 1060). They can legally divest themselves of these powers only by transferring the kirkyard to the Parish Council (57 & 58 Vict. c. 58 s. 30; cf. *Russell*, *ut supra*, per L. Kinnear).

In the allocation of the area, the heritors are entitled to have family burying-places reserved for themselves before lairs are given to other parishioners (Duncan, *Par. Ecc. Law*, ch. xv.; cf. argument in *Duddingston* case, *ut supra*). Thereafter the lairs are allocated for interment as they are required (Rankine, *Land-Ownership*, 172). When ground has been allocated, it must not be arbitrarily interfered with. Only "some overruling necessity or strong expediency" (*Hill*, *ut supra*) will justify encroachment on a grave in which the right of sepulture has been acquired (also *Wilson*, *ut supra*). It is thus only in exceptional cases that the heritors are entitled to allocate of new a lair which had previously been allocated. As the purpose of interment is the disintegration of the body, the heritors would in theory be entitled to resume the grave for allocation when the process of disintegration is complete. But where a grave is used as a family burying-place, or where near relatives of the deceased survive, considerations of policy and good feeling make reallocation impossible. If, however, the latest burial in the grave be very remote,—especially if there is want of space in the kirkyard,—"old graves may be used for new tenants" (*Ure*, *ut supra*). In a case of high expediency, heritors were allowed to encroach on the kirkyard for the extension of the church (*Steel*, *ut supra*; contrast *Hill*, *ut supra*). Allocation gives the allottee and his representatives a possessory right, which they can vindicate against threatened encroachment (*M'Bean*, 1859, 21 D. 314; *Wilson*, *ut supra*); and it is no answer to their objection, to offer a right of sepulture elsewhere in the churchyard (*Hill*, *ut supra*). The right of protecting a grave against encroachments extends to representatives of the deceased who are not resident in the parish (*Turner*, 1869, 7 M. 538).

The general principle ruling the heritors' management is, that it must be in all respects consistent with the purposes of the trust. Even the heritors cannot combine to use a kirkyard for a purpose foreign to its proper uses. This would be a breach of trust which any parishioner could prevent (*Wright* v. *Elphinstone*, 1881, 8 R. 1025). The Statutes against the holding of fairs and markets in kirkyards (1503, c. 83 and 1579, c. 70) simply attach a severe penalty to what is prohibited by the common law. Although in virtue of custom the minister has been held entitled to the grass of the kirkyard (*Hay*, 1778, 5 Bro. Supp. 415; *Spence*, 1 Dec. 1808, F. C.), yet he is not entitled to pasture his bestial there, his right being simply to cut the grass

and remove it for use (*Beaton*, 1734, Elch. Glebe, No. 1). It cannot be computed as part of the minister's grass (*Beaton, ut supra*; and *Bass*, 1669, Mor. 8019—overruled in other points). The management must not be inconsistent with respect for the feelings of the relatives of the dead (*Wilson, ut supra*); and accordingly, while the heritors are entitled to improve the kirkyard by lowering levels and otherwise, they are bound to treat reverentially any remains thus disturbed (*Robertson*, 1868, 5 S. L. R. 405; cf. *Steel, ut supra*).

The heritors are entitled to exercise control as to all erections in the kirkyard. This control extends not only to erections of an unusual character, such as a wooden building for watching against resurrectionists (*Ure, ut supra*), but to tombstones and other monumental erections (*M'Bean, ut supra*). So entirely are all erections within the heritors' control, that, having permitted the erection of a mausoleum, they can prevent it from being used as a chapel (*Wight* v. *Elphinstone, ut supra*), though indeed this would be open to the objection of any parishioner, as a diversion of the ground from its proper uses.

In the course of management the heritors may, in certain circumstances, alienate or excamb part of the kirkyard, but a very strong case of necessity or high expediency must be made out. There might be alienation or excambion of a portion inconveniently situated in which there had been no burial for a long time, or of a portion which had never been used for burial. It was held *ultra vires* to excamb a part used recently for burial in return for an addition to the kirkyard (*Russell, ut supra*). Excambion by minister and presbytery is invalid, the sole title being in the heritors (*Bain*, 1887, 14 R. 939).

As proprietors, the heritors take all steps necessary for the protection of the kirkyard, but any one heritor may interfere to prevent encroachment, *i.e.* to prevent any inversion of the possession (*Ure, ut supra*). Their powers include power to compromise (*Fraser*, 1893, 21 R. 278). They defray any expenses from the heritors' assessment.

Parishioners cannot obtain any right of property in a grave in the kirkyard, but the interest acquired to protect the grave against interference is a right of a very strong character. Every parishioner has a title to check any breach of the trust subject to which the kirkyard is held. As regards rights of burial, Dissenters are under no disabilities.

(3) By the Local Government (Scotland) Act, 1894 (57 & 58 Vict. c. 58, s. 30, subs. 6), "the heritors of any parish may transfer the property of any churchyard which they hold to the parish council, and the parish council, if they accept such transfer, shall thereafter hold such churchyard for the same purposes" and with the same duties, powers, and liabilities as previously lay on the heritors. But the power, duty, and expense of extending the churchyard remain on the heritors, as does also liability for existing debt. See PARISH COUNCIL.

2. *Burial-Grounds.*—Under the Burial-Grounds (Scotland) Act, 1855, and amending Acts (18 & 19 Vict. c. 68; 20 & 21 Vict. c. 42; and 49 & 50 Vict. c. 21), certain local authorities are empowered, and in some circumstances required, to provide burial-grounds. The Statute does not in terms affect the powers and duties of heritors with respect to kirkyards, but in practice it materially lightens the burden on them. It is to be noticed that whereas all relating to kirkyards falls under ecclesiastical arrangements, the procedure under the Act of 1855 is purely civil. This distinction is of importance as regards all changes in the boundaries of parishes effected under the Local Government (Scotland) Acts of 1889 and 1894 (52 & 53

Vict. c. 50, ss. 49, 51, and 96; 57 & 58 Vict. c. 58, s. 46; Shennan, *Boundaries of Counties, etc.*, Introduction, p. xxix).

(1) The administration of the Act is intrusted to local authorities as follows:—In burghs having the parliamentary franchise (within the boundaries as fixed for valuation purposes), the local authority is the town council (*a*) if the parish and the burgh are coextensive; (*b*) if the burgh contains parts of two or more parishes; (*c*) if the burgh contains only part of one parish, and the Sheriff has determined that the whole parish shall be treated as burghal. In all other cases the local authority is the parish council (18 & 19 Vict. c. 68, ss. 2 and 3; 19 & 20 Vict. c. 103, s. 69; 29 & 30 Vict. c. 50).

(2) The Statute may be put in operation in two ways: (*a*) An existing burial-ground may be closed. (*b*) On requisition by ten ratepayers or by two councillors, the council must, at a special meeting, consider the advisability of providing a new burial-ground, and by a majority of those present may resolve to do so. The effect alike of a closing order and of such a resolution, is that the council must forthwith proceed to provide a suitable and convenient burial-ground. If, from any cause, it is not provided within six months of the closing order or of the requisition, the council, or ten or more ratepayers, or two councillors, may apply to the Sheriff to have the necessary ground designated (see *Fulton*, 1862, 24 D. 1027). After inquiry and intimation, the Sheriff designates a burial-ground, his decision being appealable within fourteen days to any Lord Ordinary of the Court of Session. The burial-ground must not be within 100 yards of any dwelling-house, unless the owner consents in writing. It need not be within the parish. Councils of different districts may combine in providing a burial-ground, the councils acting for this purpose as one joint council. An existing cemetery may be purchased, or the council may contract for the right of interment in an existing cemetery. Provision is made for the application of the Lands Clauses Act when necessary. A burial-ground so provided becomes the burial-ground of the parish or parishes; and where a new burial-ground is provided in the place of one closed under the Act, the new burial-ground takes over all the liabilities of the old (18 & 19 Vict. c. 58, ss. 9–16).

An anomalous case may arise where (as has been done) the local authority acting under the Act has made an addition to a kirkyard. Any difficulty of administration can now be got over by the heritors transferring the kirkyard to the parish council (57 & 58 Vict. c. 58, s. 30).

(3) The management of a burial-ground is vested in the town council or parish council, and is exercised subject to such general regulations relating to burial-grounds as may be made by the Secretary for Scotland. The Statute permits the local authority to sell exclusive rights of burial in such parts of the burial-ground as the Sheriff may sanction (49 & 50 Vict. c. 21, amending sec. 18 of the principal Act), and also the right of raising chapels and monumental erections. They may provide for the conveyance of bodies to the burial-ground, and provide a place for their reception prior to interment. They may lay out the burial-ground appropriately, and for its protection certain provisions of the Cemeteries Clauses Act, 1847 (an English Act), are incorporated. They may charge such interment fees as the Sheriff approves (18 & 19 Vict. c. 68, ss. 17–25). They may appoint the necessary officials, and dismiss them at pleasure (*ib.* s. 30). They must keep separate minute-books and account-books, to be open to the inspection of ratepayers; and also a register of burials, in which all burials must be entered so as to identify where the several bodies are buried

(*ib.* ss. 29 and 31). Any deficiency in the funds is raised by an assessment, levied in the same manner as the poor-rate, and there is power to borrow for capital expenditure (*ib.* ss. 26 and 27).

The Closing of Burying-Places.—"Any churchyard, cemetery, or place of sepulture, so situated or so crowded with bodies, or otherwise so conducted as to be offensive or injurious to health," is a nuisance within the meaning of the Public Health (Scotland) Act, 1867 (30 & 31 Vict. c. 100, s. 16); and the powers conferred by that Act for the removal of nuisances have been exercised to secure the closing of such burial-places.

The same end may be secured, and the opening of new burial-grounds in unsuitable localities may be restrained, by the method prescribed in the Burial-Grounds Act (18 & 19 Vict. c. 68, ss. 4–8). The initiative may be taken by two members of the parish council, or ten ratepayers, or two householders residing within a hundred yards of the burial-ground or proposed burial-ground, or by the Local Government Board for Scotland (30 & 31 Vict. c. 101, s. 96).

The procedure is by petition to the Sheriff, who, after inquiry, pronounces an interlocutor and transmits it to the Secretary for Scotland. On the latter's representation Her Majesty in Council may restrain the opening of a new burial-ground, and order the discontinuance of burials in specified places.

Buying of Pleas.—By Act 1594, c. 220, members of the College of Justice, and inferior judges, "their deputes, clerkes or advocates, directly or indirectly, by themselves or any others in their names," are prohibited, upon pain of deprivation of office, from purchasing "lands, teinds, rowms or possessions" which are the subject of a depending action. By construction this includes moveable debts and all debateable rights which are the subjects of a depending suit. The right acquired by such purchase is not null (*Colt*, Mor. 9495; *Purves*, 1683, Mor. 9500; *Home*, 1713, Mor. 9502). A gratuitous disposition does not fall within the scope of the Statute (*Hume*, 1678, Mor. 9498). The object of the Act seems to have been to prevent any one connected with the court from acquiring a personal interest in a cause, which might induce him to use his influence in court to further his own ends in connection therewith (Stair, i. 10. 8, i. 14. 2; Bell, *Prin.* s. 36; M. Bell, *Conveyancing*, 1–161. See PACTUM DE QUOTA LITIS).

By-law.—(The word by-law is derived from *by-lag* or *by-lor*, *by*, a villager, and *lag* or *lor*, law.) "A by-law is a law made with due legal obligation, by some authority less than the Sovereign and Parliament, in respect of a matter specially or impliedly referred to that authority, and not provided for by the general law of the land" (Lumley on *By-laws*, 2). Corporations, governing bodies, and local authorities require the establishment of fixed and known rules, in accordance with which their internal government shall be carried on. The law has deemed it more advisable to leave these rules to the discretion of the governing body, and those composing them, who are supposed to know what is most conducive to their own interests and welfare. The power of making by-laws may arise: (1) by necessary implication; (2) by charter; (3) by Statute; (4) by custom.

1. Corporations, associations, literary, religious, and scientific bodies, boards for admitting persons into professions, and clubs, where there is no

express power of making by-laws by Statute, possess the power to make by-laws, rules, or ordinances to regulate themselves, to govern their members, and to carry out the purport and object of their association (*K.* v. *Westwood*, 1830, 7 Bing. 1 (corporation); *Hodgkinson*, 1867, L. R. 5 Eq. 63; *Lyttleton*, 1875, 33 L. T. 642 (associations and clubs).

2. Express powers as to making by-laws may be given in a charter.

3. By Statute, Parliament has delegated the function of making laws in reference to a great variety of subjects to authorities in local districts, or to other bodies having control over special subjects. This has prevailed to a very large extent in the case of private local Acts, corporate bodies, improvement commissioners, and local government authorities. The power has also been conferred upon certain departments of the State, *e.g.* the Board of Trade in regard to railways, the Secretary of State in regard to the Acts relating to mines, and the Privy Council in regard to the Acts relating to contagious diseases among animals. The powers conferred upon these authorities enable them to pass laws, which are variously termed by-laws, orders, or regulations.

4. The earliest authority for making by-laws is by custom. In England the customs which led to formation of by-laws were associated with towns and villages, and the enactments were made by the inhabitants (Speeman's *Glossary*, in verbo *Bellagines*). As the power of making by-laws in the case of corporations, associations, and local authorities is now either conferred by Statute or is implied, it is unnecessary to deal with the question of by-laws arising from custom.

Publication of By-laws.—Unlike Statutes, by-laws must be published, and no by-law is binding until it has been published. When published, a by-law binds parties upon whom it can operate, without any specific notice to them individually. As regards by-laws made under implied authority, no specific form of publication has been established. The body declaring the by-law generally causes it to be committed to writing and preserved among its official documents. Where by-laws are made under Statutes, the Statute authorising the by-law generally contains specific provision as to publication.

Repeal, Alteration, and Neglect to Enforce a By-law.—Modern Statutes which enable authorities to make by-laws contain special power for their repeal, revocation, or alteration. Where this is not the case, the general rule is that the same authority under which a by-law can be made may subsequently repeal it absolutely, or substitute another for it. A by-law cannot be set aside by non-usage (*Shaw*, 1832, L. J. R. (N. S.) Q. B. 216); but a by-law cannot be enforced by an enacting body which has technically broken it (*Jennings*, 1865, 1 L. R. Q. B. 7).

Obligation of By-laws upon Strangers.—Where a by-law is passed to regulate the use and enjoyment of joint property, or property in which persons have some joint interest, that by-law cannot operate upon persons who have no interest in the property. So also where a by-law is passed to govern the conduct of the members of a corporation, or to protect, secure, or enhance the rights and interests of a corporation, this can have no effect upon persons who are not members of the corporation.

Properties of By-laws.—In the formation of by-laws there are certain principles which must be observed. To express it otherwise, by-laws should possess certain properties, or, as L. Coke, puts it, "qualities" (*City of London* case, 8 Co. Rep. 251, per L. Coke).

1. *A By-law must be consistent with, and not repugnant to, the General Law.*—It is obvious that a limited authority cannot be permitted to make

a by-law which contravenes directly, or indirectly, that which is established as the general law, either in reference to individual conduct or the policy of the Government (*Dearden*, 1865, L. R. 1 Q. B. 10). It is, however, to be observed that a by-law cannot be said to be inconsistent with the general law merely because it forbids the doing of something which might lawfully have been done before, or requires something to be done which there was no previous obligation to do, otherwise a power of making by-laws would be utterly nugatory (*Edmonds, Watermen's Company*, 1855, 1 Jur. (N. S.) 727, per L. Campbell).

2. *A By-law must not make a Provision in a Matter already provided for by Law, other than what the General Law has prescribed, e.g.* imposing a penalty for an offence already dealt with by the law (*Calder & Hebble Navigation Co.*, 1845, 14 M. & W. 76 (by-law as to Sunday navigation)).

3. *A By-law must be certain in its Enactment.*—It must be free from ambiguity, and afford complete direction to those who are to obey it. The penalty imposed by a by-law must not be left to the arbitrary assessment of the makers of the law according to the circumstances, even though the utmost extent of the sum be limited; but the penalty need not be expressed specifically—it is sufficient if it can be rendered certain by reference to some standard (*Brown*, 1877, L. R. 2 Q. B. D. 409, per Lush, J.). It is usual to find in recent Statutes, which authorise the making of by-laws, a maximum penalty fixed.

4. *A By-law should be General, obligatory upon all Persons equally and indiscriminately.*—It must not be made for the benefit or for the detriment of any particular person, *e.g.* it is of doubtful expediency and may lead to question to insert in a bye-law a provision that the authority who made the by-law may make an exception from the general rule laid down.

5. *The By-law must be Reasonable.*—Courts of law have the power to determine whether a by-law is a reasonable one, upon the principle that delegated legislation is only permitted upon the assumption that it shall be reasonable. By-laws by a corporation excluding persons from an office to which by charter they are eligible are bad as being unreasonable; but those which lay down a criterion of fitness for office are good (*Q. v. Saddlers' Company*, 1862, L. J. Q. B. 337). By-laws made to cramp or restrain trade are bad; but by-laws made to restrain trade in order to the better government and regulation of it are good in some cases, namely, if they are for the benefit of a place, and to avoid public inconveniences, nuisances, etc., or for the advantage of the trade and improvement of the commodity (*Mitchell*, 1 Peer. Will. 184, per Parker, C. J. A power to pass by-laws for "regulating and governing" certain traders in a city will not include power to prohibit them altogether from plying their trade in the city (*Municipal Corporation of Toronto*, 1896, App. Ca. 88). A by-law is unreasonable if it is oppressive or curtails the liberties of individuals more than is necessary to give effect to the object which it has in view (*Johnson*, 1886, 16 Q. B. D. 708; *Munro*, 1887, 57 L. T. 366); but a by-law which may impose hardship or inconvenience upon an individual is not unreasonable if it is for the general good (*Hendon Local Board*, 1889, 42 L. R. Ch. Div. 402, followed in *District Council of Burton Regis*, 1896, 12 T. L. R. 367 (by-law as to width of streets)). What is reasonable in one locality may not be so as to another, because of the different circumstances of the two districts (*Heap*, 1884, 12 Q. B. D. 617, and cases therein cited; *Everett*, 1861, 3 L. T. 669). A by-law may be unreasonable by nature of the penalty attached (*Saunders*, 1880, 5 Q. B. D. 456). It is to be observed that a by-law may be good in part and bad in part, if the two parts are distinct from one another

and separately entire (*R.* v. *Lundie*, 1862, 10 W. R. 267; *Rex* v. *Faversham*, 1799, 8 T. R. 352.

A By-law must not be ultra vires *of the Authority of the Body enacting it* (*Cadenhead*, 1894, 22 R. (J. C.) 1) (by-law relating to locomotives); *Eastburn*, 1892, 19 R. (J. C.) 100) (by-law as to nuisance, advertisements); *Institute of Patent Agents*, 1894, 21 R. (H. L.) 61).—Where a Statute provides that an authority may by by-law prevent something being done in any area within certain limits, it is invalid to prohibit within the whole limits indicated (*MacBride*, 1874, 1 R. (H. L.) 14; *Green*, 1896, 33 S. L. R. 260; Brice on *Ultra Vires*, 7). See County Council; Public Health; Road and Bridges.

Cabs.—See Hackney Coachmen.

Calendar.—The calendar by which the months and other divisions of the civil year are adjusted to the solar year is known as the Julian Calendar. It was introduced by Julius Cæsar, 46 B.C. The year was divided by him into 12 months, each month having the same number of days as now. Each year had 365 days, except every fourth year, which was a leap year, and had an extra day. This computation made the civil about 11 minutes longer than the solar year. To correct the accumulated error which had arisen from this annual difference, Pope Gregory XIII. ordained that 10 days should be deducted from the year 1572, and that the 5th should be reckoned the 15th October in that year. To prevent a further discrepancy from arising, he ordained that every hundreth year, excepting every fourth hundreth, should not be counted a leap year. Thus 1800, 1900, 2100, etc., are not leap years, and 2000 and 2400 are. This alteration suggested by the Pope was adopted in most European countries, but it was not till 1751 that the change was made in Great Britain. By Act 24 Geo. II. c. 23, it was provided that the day following 2nd September 1752 should be accounted 14th September, thus omitting 11 nominal days. A change was also made as to leap years, and it was further provided that each year should commence on 1st January, and not on 25th March, according to the former practice. In Russia the old style of calendar is still in use, and dates vary by 12 days, according as the old or new style is used. To avoid mistakes, persons in Russia, when writing to other countries, usually give the date both according to the Russian and the new style.

Call.—A modern legal term, but used as far back as the Bubble Act, 1719 (6 Geo. I. c. 18). It signifies the demand for contribution of capital made by directors of a joint-stock company upon shareholders, or by a liquidator upon contributories. It also means the sum demanded.

Directors' Calls.—To make a call valid, the Board must be properly constituted. If the prescribed number of directors does not exist, and there be no authority to a less number to act, or if at the meeting a quorum is not present, no valid call can be made. The maximum amount of a call, with the rate of interest chargeable, and the minimum interval between calls, are generally specified in the articles of association, and these must be observed. The call is made by the directors passing a resolution; and members are also entitled to notice, stating when, where, and to whom it

is payable. But it becomes a debt due by the members to the company at the time it is made; and on default, payment with interest may be enforced by action. See *Ferguson*, 1881, 8 R. 997. It is generally provided in the articles that members shall not be entitled to have shares transferred on the register till calls made have been paid, and that the company has a lien or right of retention over shares for calls and other debts; but this right exists at common law (*Bell's Trs.*, 1886, 14 R. 246). After a call has been made, it may be arrested in the hands of the member at the instance of a creditor of the company. If a call be not paid before a company goes into liquidation, it becomes enforceable by the liquidator, and may be recovered under the Companies Act, s. 101 (*Benhar Coal Co.*, 1882, 9 R. 763).

It is a relevant defence to an action by a company for a call, that the defender is not a member of the company, and did not agree to become one, or was induced to take the shares by misrepresentations made by or on behalf of the company (*City of Edinburgh Brewery Co.*, 1869, 7 Macp. 886); also that the call was not validly made: but as to failure to give notice, see *Ferguson*, *supra*: compensation or set-off in respect of a debt due by the company to the shareholder is also competent, the company being a going concern (*Taunton & Co.*, 1893, 2 Ch. 175); but the completed transaction, or the agreement to set-off, must be competently proved (*Cowan*, 1878, 5 R. 680).

Liquidator's Calls.—The power to make calls is conferred by the Companies Act, 1862, on the Court, in the case of a winding-up by the Court (s. 102); and on the liquidator in a voluntary winding-up (s. 133, 9). If the winding-up be under supervision, the Court sanctions the call. The call is made on those settled on the list of contributories. The amount of calls, and the interval between calls, is not regulated by the articles of association. The extent of liability is defined by the Companies Act, 1862, s. 38, and in limited companies is restricted to the amount unpaid on the shares, so far as necessary to meet the debts of the company, the costs of winding-up, and to adjust the rights of contributories *inter se*, *e.g.* if more has been paid up on some shares than on others. The nature of the liability is defined by the Companies Act, 1862, s. 75. It creates a debt accruing due from the contributory at the time when his liability commenced (the acquisition of the shares), but payable when the calls are made. On the construction of this section, see *Wishart & Dalziel*, 1879, 6 R. 823; *Galletly's Trs.*, 1880, 8 R. 74. In fixing the amount of a call, the probability that some contributories may not be able to pay in full may be taken into account. The full amount uncalled may be demanded in one or more calls, and a call may be payable by instalments. The rate of interest payable on default is not that specified in the articles, but the usual rate of five per cent. Calls may be enforced by the summary method prescribed in Companies Act, 1862, s. 121, upon a list certified by the liquidator, decree being granted *de plano* without intimation, and suspension being competent only upon caution or consignation, unless with special leave of the Court (*Anderson*, 1880, 2 R. 44). Orders obtained in Scotland may be enforced in England or Ireland, and *vice versâ*, in the corresponding Court, and in the same manner as if the order had been made by the Court in the case of a company within its own jurisdiction. Thus a decree of the Court of Session in the winding-up of a Scottish company will be made an order of the Chancery Division in England (*City of Glasgow Bank*, 1880, 14 Ch. D. 628). But this is not necessary in Ireland (*Hercules Insurance Company*, 6 Ir. Eq. 207). In Scotland an English or Irish order may be

registered and certified by the Bill Chamber Clerk, and thereupon becomes a sufficient warrant on which to charge and use further diligence, as upon a Court of Session decree (Act of Sederunt, 21 June 1883).

It is not a relevant defence to a liquidator enforcing a call (whether made in the liquidation, or previously by the directors), (1) that the contributory was induced to become a member by misrepresentations made by or on behalf of the company, unless the challenge was made before the winding-up began (*Oakes*, 1867, 2 H. L. 325; *Tennent*, 1879, 6 R. (H. L.) 69); nor (2) that the company is indebted to the contributory (the plea of compensation or set-off). The reason is, that the company and the liquidator are not really the same person: the liquidator is a statutory trustee bound to ingather the assets of the company, not for the shareholders, but in the first place and preferably for the creditors, who have a *pari passu* ranking *inter se* (Companies Act, 1862, ss. 38, 101, 102; *Black & Co.*, 1872, 8 Ch. 254; *Cowan*, 1878, 5 R. 581; *Whitehouse & Co.*, 1878, 9 Ch. D. 595. See also *Pyle Works*, 1889, 44 Ch. D. 534; and *Taunton & Co.*, *supra*).

This applies to all forms of liquidation, and to companies, whether limited or unlimited, subject, however, to two exceptions: (1) after the creditors of any company, *whether limited or unlimited*, have been paid in full, and when, therefore, the liquidation only exists for the adjustment of the rights of contributories *inter se*, money due by the company to a contributory on any account may be set against subsequent calls, *i.e.*, it would seem, calls made subsequent to the payment of creditors in full (ss. 38 (7) and 101 *ad fin.*); and (2) in the case of *unlimited* companies, when a contributory is ordered to pay money due by him (other than liquidator's calls), *e.g.* unpaid directors' calls, or allotment instalments, or money due under sec. 165, he may set-off against such debts any money due to him on any independent contract or dealing with the company (but not unclaimed dividends) (s. 101; *Branwhite*, 1879, 48 L. J. Ch. 463. See also *Pelly*, 1882, 21 Ch. D. 492). The reason for this latter exception is not very obvious; nor why it is confined to unlimited companies, except that such companies are much less likely to prove insolvent. See JOINT STOCK COMPANY.

Calling List: Calling Summons.—After a summons has been executed, and the *inducie* have expired, the pursuer brings the case into Court by the process of calling the summons. The calling was formerly performed by the clerks in open court; they attended at the side bars of the Outer House about 8.30 A.M., and read aloud the *partibus*, which was a note lodged along with the summons, describing its nature and containing the names and designations of the parties, and the names of the pursuer's counsel and agent. Each clerk alternately called a case in the order of his seniority. This duty was performed every Thursday and Saturday during the sitting of the Court, except during the last nine days of the winter and the last seven days of the summer session, when every sederunt day was a calling day. The calling was generally over before the Lords Ordinary took their seats at nine o'clock. When appearance was to be made for the defender, the clerk of the counsel who was retained for the defence was instructed to attend at the calling, and a note of the names of the defender's counsel and agent was then made upon the *partibus* by the clerk. The summons was thereafter "given out" to the defender's agent, he being bound to return it with the defences within six days, when it might in like manner be given out to the agents for any other defenders. Minutes of outgiving and returning were endorsed upon the summons, and signed by

the counsel for the parties. The case was thereafter enrolled in the *ordinary action roll*, or the *suspension and advocation roll* (if that was the nature of the process) for further procedure. If no appearance was made for the defender, or if appearance was made and was withdrawn, the case was enrolled in the *regulation roll*, and if, when called in that roll, there was still no appearance for the defender decree in absence was pronounced. These rolls were called upon special days of the week, but cases which were either not called upon their proper day, or, being called, were not fully heard, might be disposed of on any subsequent day of the week as opportunity offered. The *viva voce* calling by the clerks, and outgiving and returning by the advocates were abolished by A. S. 11 March 1820. Calling lists were substituted, which were to contain the particulars set forth in the *partibus*, and to be exhibited in the Outer House from ten o'clock till two on each sederunt day immediately preceding the day for the enrolment of the cause in the Outer House Rolls. Appearance was entered upon the same day by the agent for the defender attending at the clerk's office between six and seven and marking the *partibus* as previously. He was then entitled to borrow the process, being bound to return it with his defences within six days. The calling of summonses is now regulated by the Court of Session Act, 1868, s. 22, and A. S. 14 Oct. 1868, ss. 8–15. They may be called upon any sederunt day, and if not called on the first sederunt day after the expiry of the *inducie*, or on one of the two sederunt days next ensuing, the defender may put up protestation. Summonses may also be called on the box-days in vacation or recess. In order that a summons may be called it must be lodged with the clerk on the lawful day preceding the calling day, or in vacation or recess on the second day preceding the box day. The *partibus* is written on the margin of the principal summons, and along with the summons there should be lodged at calling (1) a certified copy of the summons; (2) an interlocutor sheet; (3) an inventory of process; (4) a duplicate inventory of process; (5) a roll of defenders' names, if more than three, a copy of this being also put up on the walls of the Parliament House by the agent; (6) an inventory of pursuer's productions, with (7) these productions themselves; and (8) a copy of the *partibus* for the printer. The last of these is handed by the clerk to the printer of the rolls, and the case appears next day in the calling list, which is printed at the commencement of the daily rolls, and is published on the walls of the Parliament House. When a case appears in the calling list it is held to be brought before the Lord Ordinary and the Division of the Court specified in the *partibus* (A. S., 7 Dec. 1871). Appearance may be entered for the defender on the day of calling, or on either of the two days following (see APPEARANCE), and if no appearance is entered, the case may be enrolled in the undefended roll for decree in absence (see ABSENCE, DECREE IN). Where a note of suspension had passed in the Bill Chamber, it used formerly to be necessary to call it before the Lord Ordinary to whom it was marked, but the calling of such processes was abolished by the Court of Session Act, 1868, s. 90, and the case is now enrolled in the Lord Ordinary's motion roll for adjustment of the record after it has been transmitted to the Court of Session (see SUSPENSION). The separate calling list for teind causes has also been abolished (A. S., 14 Oct. 1868, s. 15), and such cases are now called from time to time in the daily rolls under the direction of the Teind Clerk. If a summons is not called within a year and a day from the last date of compearance, it falls and cannot be wakened (A. S., 26 Feb. 1718: *M'Kidd*, 1882, 19 S. L. R. 603). When a pursuer dies or becomes bankrupt before a summons is called, it may be called by his representatives or trustee

(Shand, *Practice*, 265), and where a defender dies during the same period, the summons may be called against his representatives (*Cameron & Mandy.*, 1838, 16 S. 907). When there are joint pursuers the summons may be called at the instance of any one of them for his share if the obligation is divisible (*Shaw*, 1893, 20 R. 718).

[Mackay, *Practice*, 408, *Manual*, 206; Coldstream, *Procedure*, 11; Shand, *Practice*, 264; Beveridge, *Process*, 243; Ivory, *Process*, 146, 173.] See PARTIBUS; PROTESTATION; INDUCIÆ; ROLLS OF COURT.

Calumny, Oath of.—The oath *de calumnia*, in which the pursuer swears that the action is prosecuted without concert or collusion with the defender, must be administered in all actions of divorce (11 Geo. IV. and 1 Will. IV. c. 69, s. 36). It is in practice administered also in actions of declarator of nullity of marriage on the ground of impotence. It may be taken to lie *in retentis* if the pursuer is going abroad, and that even before the summons is called (*Scott*, 1866, 4 M. 1103). When the pursuer is abroad or unable to attend, the oath may be taken on commission (*Orde*, 1846, 8 D. 535). The oath in no way prevents a reduction of the divorce if this is afterwards shown to have been obtained by collusion (Fraser, *H. & W.* ii. 1196; *Bonaparte* [1892], P. 402). See the oath printed in Walton, *H. & W.* 319; and see *Paul*, 17 D. 604.

Camera.—Though there is no statutory power given to a judge to hear a case *in camera* in civil actions, it is permissible in exceptional cases for him to order the doors to be closed where in his opinion secrecy is desirable in the interests of public morality.

Canals.—A canal has been defined as "an artificial highway by water constructed for the benefit of the public by adventurers authorised by the Legislature to take tolls for its use as a compensation for their risk and labour in the undertaking" (Webster, *Law relating to Canals*). This definition seems to require the addition of the words "or public commissioners" after "adventurers," and of the words "or to recoup the cost of construction, maintenance, and management" after "undertaking," to make it properly comprehensive. Canal companies were originally regarded merely as owners of the waterway, who received tolls for its use, the barges and locomotive power being supplied by other persons.

By the Canal Companies Tolls Act, 1845 (8 & 9 Vict. c. 28), canal companies were authorised to levy their tolls on different portions of their undertaking, and to reduce or advance them from time to time. They were subjected to an equality clause requiring equal treatment of all persons under the like circumstances, and the limitation of the proportion of tolls to profits existing under certain canal special Acts was safeguarded. By the Canal Companies Carriers Act of the same year (8 & 9 Vict. c. 42), they were authorised to act as carriers of goods upon their canals, or canals communicating therewith, and empowered to lease their tolls to other companies. The Cheap Trains Act of 1858 (21 & 22 Vict. c. 75) contained a provision (s. 3) prohibiting canal companies also being railway companies from accepting a lease of another canal company's undertaking in whole or in part, or of tolls and charges upon it, without express parliamentary authority. In 1847 canal companies were authorised (10 & 11 Vict. c. 94)

to borrow money in the manner prescribed by the Companies Clauses Consolidation Acts.

The general provisions of the Railway and Canal Traffic Acts (see RAILWAYS, *infra*) apply to canal companies, and these Acts also include provisions specially applicable to canals. By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), canal companies, along with railway companies, were required to afford all reasonable facilities for the reception, forwarding, and delivering of traffic upon and from their canals, and for the return of boats; to abstain from giving any undue or unreasonable preference or advantage to, or subjecting to any undue or unreasonable prejudice or disadvantage, any particular person or company, or any particular description of traffic; and, in the case of companies having or working canals which form part of a continuous line of canal or railway and canal communication, or have the terminus or wharf near the terminus station or wharf of another canal or a railway, to afford all reasonable facilities for the transmission of traffic, so that no obstruction should be offered to the public desirous of using the canal as part of a continuous line of communication; and all reasonable accommodation should be afforded to the public for that purpose. The word canal in that Act is defined as including "any navigation wherein tolls are levied by authority of Parliament, and also the wharves and landing-place of and belonging to such canal or navigation, and used for the purposes of public traffic." The Act of 1873 (36 & 37 Vict. c. 48, ss. 16 and 17) prohibited agreements being made without the sanction of the Railway Commissioners by which the control of canal traffic passed into the hands of railway companies, and enjoined the Commissioners to withhold their sanction from any such agreement which should be in their opinion prejudicial to the interests of the public; provided for full and complete notice of such agreements when proposed; and enacted that every railway company owning or having the management of any canal should keep it in proper repair and navigable condition for the use of the public. (See *Foster*, 3 R. and C. T. Ca. 14; *Wilts, Somerset, and Berks Canal Traders Association*, 3 R. and C. T. Ca. 20 [reduction of tolls under private Act]; *Donaby Main Colliery Co.*, 4 R. and C. T. Ca. 28; and *Warwick and Birmingham Canal Co.*, 3 R. and C. T. Ca. 113 and 324.)

The third part of the Act of 1888 (51 & 52 Vict. c. 25, ss. 36–46) is devoted to a series of provisions in regard to canals, generally applying to them the provisions of the Railway and Canal Traffic Act previously confined to railways, and directed towards reversing the tendency which led to their becoming controlled by the railway companies, and towards fostering them as competitive routes for the transit of goods. The provisions of Part II. of the Act (relating to railway traffic) are made to apply as far as they are applicable to canal companies and their charges; sec. 15 of the Act of 1873 to apply to the terminal charges of a canal company; and the Acts of 1854 and 1873 to extend to any person whose consent is required to any variation of the rates, tolls, or dues charged for the use of a canal or by a canal company, to canal companies generally, and to the tolls and dues chargeable in respect of canals. Nothing in any agreement is of avail to prevent the Commissioners from making or enforcing any order for a through rate or toll which may, in their opinion, be required in the interest of the public. The forwarding of traffic includes its passing from railway to canal, or *vice versâ*; and the provisions of the Acts of 1854, 1873, and 1888, regarding through rates, extend to any canals which, in connection with any river or other waterway, form part of a continuous line of water communication, notwithstanding that tolls are not leviable on

such river or waterway. Special provisions are levelled at the control exercised by railway companies over canals acquired in the interests of their railway. Where a railway company, or persons on their behalf, have the control over, or the right to interfere in regard to, the traffic, or the tolls or rates for the conveyance of merchandise upon a canal, or any part of one, and it is proved to the satisfaction of the Commissioners that the tolls, rates, or charges levied are calculated to divert the traffic from the canal to the railway, to the detriment of the canal, or persons sending traffic over it, or other canals adjacent to it, they may, on the application of an interested party, order the charges to be altered and adjusted in such a manner that the same shall be reasonable as compared with the rates and charges for the conveyance of merchandise upon the railway. Similar provisions to those applied to railway rates are enacted for working out the principle thus enunciated; and others are made for returns by canal companies to the Registrar of Joint-Stock Companies and to the Board of Trade, and for the submission to, and sanction by, the Board of Trade, of the bye-laws of canal companies, and for the inspection of canals by officers of the Board.

The acquisition of any interest in a canal, by the application or use of any part of a railway company's funds, either by way of purchase or guarantee, is expressly prohibited, without express statutory authority; the interest so acquired is declared forfeited to the Crown: and the directors or officers who have carried out the transaction are made liable at the instance of any shareholder to repay to the company the sums so applied or used, and the value of the canal interest so forfeited. Canal companies may enter into agreements for the through passage of boats and traffic, for through rates, for apportioning receipts, and for the erection of warehouses and conveniences. These through tolls may be computed at a lower rate than those charged for local traffic, and similar existing contracts are declared valid. Power is given to canal companies to establish a clearing system, under regulations approved by the Board of Trade, on the lines of that established by the Railway Clearing House Act of 1850, and detailed provisions are made for the abandonment of unnecessary and derelict canals.

The provision of the Explosives Act, 1875 (38 & 39 Vict. c. 17), apply to canal companies. By the Canal Boats Act, 1877 (40 & 41 Vict. c. 60), and an amending Statute passed in 1884 (47 & 48 Vict. c. 75), special provisions were made for the registration and regulation of canal boats used as dwellings, and for the health and welfare of the persons living upon them. But these two Acts, like the Statute of 1840 (3 & 4 Vict. c. 50) providing for keeping the peace on canals and navigable rivers, do not extend to Scotland.

Canals, like railways, fall to be valued separately from ordinary lands and heritages, by the assessor of railways and canals; the whole undertaking being treated as a *unum quid*, and the value being apportioned according to mileage between the parishes (counties or burghs) traversed by the canal, after deduction of a sum representing the annual value of the wharfs, docks, depôts, counting-houses, etc. The sum (5 per cent. on the cost) representing the annual value of such wharfs, etc., situated in each parish, etc., is then added to the mileage valuation, and the two together are taken as the yearly rent or value of the lands and heritages in the parish, etc., belonging to or leased by the canal company, and forming part of its undertaking (17 & 18 Vict. c. 91, s. 22; 30 & 31 Vict. c. 80). See also under VALUATION OF RAILWAYS.

Under the terms of the Acts providing for their establishment and

management, two canals situated in different counties, and forming lines of communication between different seas, have been held to constitute one undertaking for valuation purposes (*Comrs. of Caledonian Canal*, 1894, 31 S. L. R. 830; 21 R. 1045; 32 S. L. R. 108; 22 R. 149); and the rating authority of one county in which one of such canals happens to pay *per se*, although on the whole undertaking consisting of both canals in both counties the losses exceed the profit, cannot claim as a subject for separate assessment the sum representing the annual value of wharfs, etc., in their own county (*C. C. of Argyle*, 1895, L. Moncreiff, 32 S. L. R. 518). Houses originally provided for the accommodation of the company's servants, but let to outside tenants, have been held rightly included in the valuation by the assessor of railways and canals (*Forth and Clyde Nav. Canal*, 1861, 24 D. 1453; see also *Anderson*, 1847, 9 D. 402); but it may be questioned whether this decision would be repeated in view of later railway cases (*Cal. Ry. Co.*, 11 M. 988; *Dundee and Arbroath Joint Line Committee*, 11 R. 396). (As to clause of exemption from local burdens, see *Barony Parish Road Trs.*, 7 M. 197.)

In practice, in the case of the two canals owned by companies (*i.e.* railway companies) in Scotland, as the plant required by the tenant for earning revenue would be very small, the revenue really being from tolls, in addition to an allowance of 25 per cent. on the value of plant so required, an abatement of 10 per cent. for tenants' profits is made on the gross traffic receipts. In the case of the other two canals, which are carried on by public commissioners for the public benefit, without any profits being realised, there is no allowance for tenants' profits, but an allowance of $7\frac{1}{2}$ per cent. for interest and depreciation is made on the value of plant required to carry on the traffic. In 1886, L. Kinnear allowed, as deduction from the gross revenue in the case of these two canals (the Caledonian and Crinan), "all necessary outlays for management, maintenance, and repairs which are properly chargeable against revenue, and not merely of a proportion of such charges." (Munro on the *Valuation of Property*, 27; *Cal. Canal Comrs.*, 1886, 24 S. L. R. 80.)

A right to a navigable canal includes a right to a towing-path as a necessary appendage (*Swan*, 1850, 12 D. 622); and the slopes of the canal cuttings and accommodation roads constructed upon land compulsorily purchased cannot be excepted from a conveyance (the granting of which is delayed till after construction) on the ground that they are not actually used for the purposes of the canal (*Union Canal Co.*, 1856, 18 D. 655). Where powers are given by Statute to Canal Commissioners for the immediate raising of a vessel sunk in the waterway, and recovery of the expense from the owners, it is not a relevant defence to an action that the sinking was owing to negligence in allowing unseen obstacles to exist in the canal (*Comrs. of Cal. Canal*, 1856, 18 D. 1319). The owners of a canal are entitled to prevent the pollution of the water as inferior heritors (*Cal. Rwy. Co.*, 1876, 3 R. 839).

Cancellation of a document may be effected by a completed act of such a nature as to show the granter's deliberate intention to cancel, *e.g.* deletion or obliteration of the document in whole or part (*Pattison's Trs.*, 1888, 16 R. 73; *Lamont*, 1887, 14 R. 603), or mutilation thereof (*Nasmyth*, 1821, 1 Sh. App. 65; *Dow*, 1848, 10 D. 1465; *Thomson*, 1850, 12 D. 1184; see also *Forbes*, 1613, M. 11535; *Houston*, 1711, Rob. App. 552). Observe that unsigned pencil alterations will be presumed to be deliberative

merely, unless it be shown by evidence, parole or other, that they were intended to be final (*Lamont, ut supra*; cf. *Nasmyth, ut supra*: *Colvin*, 1885, 12 R. 947). Cancellation will not be operated where mutilation is the result of accident, *e.g.* wear and tear (*Irvine*, 1850, 2 D. 804; *M'Dowal*, 1713, 5 Bro. Supp. 98), or of a fit of passion followed by change of purpose (*Doe*, 3 B. & A. 489), or is the act of a lunatic (*Laing*, 1838, 1 D. 59), or of a depositary acting under mistake (*Cunningham*, 1851, 13 D. 1376; see also *Walker*, 1670, 2 Bro. Supp. 146, 476); or without sufficient authority (cf. *M'Alister*, 1873, 1 R. 166, 958; *Douglas*, 1859, 21 D. 1066). The authority may be proved *prout de jure* (*Bonthrone*, 1883, 10 R. 779. As to the *quantum* of proof, see *Anderson's Trs.*, 1883, 11 R. 35; *Bonthrone, ut supra*; *Winchester*, 1863, 1 M. 685; *Falconer*, 1848, 11 D. 220, 1338). The deed will be held as cancelled, where the granter's instructions to destroy it have been disobeyed by his agent (*Chisholm*, 1673, M. 12320; but see *Walker*, 1825, 4 S. 323), or frustrated by some interested person (*Buchanan*, 1704, M. 15932; *Bibb*, 2 W. Bl. 1043). When a deed is executed in duplicate, the destruction of one of the duplicates will effect cancellation only on proof of the granter's purpose to cancel (*Crosbie*, 1865, 3 M. 870; *Burtonshaw*, 1 Cowp. 49; *Pemberton*, 13 Ves. 310). Where a deed is, after the granter's death, found cancelled in his repositories, the burden of proving its subsistence rests upon him who claims under it (*Nasmyth, Dow, Winchester, ut supra*: cf. *Thomson, ut supra*). Observe that in determining this question of *onus*, the nature of the repositories is of the highest importance (*Crosbie, Winchester, ut supra*; see Dickson, *Evidence*, s. 767). Cancellation of a deed renders it as ineffective as if it had never existed (see *Inglis*, 1878, 5 R. (H. L.) 87; *Pattison's Trs., ut supra*; *Howden* 8 July 1815, F. C.). But a cancelled codicil (*Smith*, 1852, 14 D. 583) and erased words in a holograph testamentary writing (*Mays. of Dundee*, 1858, 3 Macq. 134) have been looked at by the Court as explaining the testator's intentions. See Dickson, *Evidence*, ss. 894 *sqq.*, 948 *sqq.*, 1341, 1344; 1 M'Laren on *Wills*, 409 *sqq.*; Jarman on *Wills*, 5th ed., 113 *sqq.*; Williams on *Executors*, 9th ed., 111 *sqq.*; Taylor, *Evidence*, s. 1067. See Bills; Casus amissionis; Delivery of Deeds.

Candidate.—See Parliamentary Elections; Municipal Elections; County Council Elections, etc.; Ballot; Corrupt and Illegal Practices; Candidate, Parliamentary, Slander of.

Candidate, Parliamentary, Slander of.—The Act of 1895 (58 & 59 Vict. c. 40) amending the Corrupt and Illegal Practices Act, 1883, provides (s. 1) that any person who, or the directors of any association which, before or during a parliamentary election, shall, for the purpose of affecting the return of any candidate, make any false statement of fact about the character or conduct of such candidate, shall be guilty of a corrupt practice, and subject to the penalty therefor. The statement of fact does not need to be explicit. A reference to a candidate's treatment of a slander about his opponent, followed by the remark that there was a dark passage in the candidate's own life, was held to be an offence against the Act (*Silver*, 1896, 12 T. L. R. 199). It is a good defence (s. 2) that the accused had reasonable grounds for believing, and did believe, the statement to be true. But it is not a good defence of a vague statement, made maliciously and believed to be defamatory and injurious, that it was

true in the sense intended by the accused, when it was readily understood by others in a different sense. An injunction (s. 3) may be obtained, on application to one of the Divisions of the Court of Session (46 & 47 Vict. c. 51, s. 68 (4)), restraining any person making such statement from repeating it, *primâ facie* proof of the falsity of the statement being sufficient for the granting of the application. A candidate (s. 4) is not affected by a contravention of the Act by an agent, other than his election agent, unless it can be shown that the candidate or his election agent consented to the making of the false statement, or paid for its circulation, or unless, upon the hearing of an election petition, the Court reports that the election of such candidate was materially assisted in consequence of its being made.

By the terms of sec. 1 the director of an association which makes a false statement is guilty of a corrupt practice; and there is no provision that it shall be a defence to show that he did not know or approve of the making of it. But probably no Court would convict a director who could show that he was no party to the making of the false statement, that he had no belief in it, and that he expressed his disapproval of the action of the association when it came to his knowledge. See SLANDER; CORRUPT AND ILLEGAL PRACTICES.

Canon Law.—The Canon law, or the law contained in the Corpus Juris Canonici, was compiled under the authority of the early Church of Rome. It consists of two main portions, the Decretum and the Decretals. The first was the work of Gratian, a monk of Bologna, and was compiled towards the middle of the twelfth century. Up to this time the canon law was regarded as a branch of theology, and was studied only in the seminaries attached to cathedrals and monasteries. During its growth the Church had extended her influence into all departments of life, and her legislation embraced many subjects belonging to the domain of municipal law.

It was Gratian who first taught the canon law as a separate science. Having selected the whole subsisting law of the Church from among the mass of canons, decretals, writings of the fathers, and the works of the ecclesiastical historians, he arranged it in one systematic work, since called after him the Decretum Gratiani (1139–1142), which soon superseded all previous compilations. The work consists of three parts. The first deals with the sources of canon law, and with ecclesiastical persons and offices, and is divided into 101 *distinctiones*, which are subdivided into canons. The second part is composed of *causæ* or cases proposed for solution, subdivided into *quæstiones*, or questions, under each of which are arranged the various canons bearing on the question. The third part, which is entitled *De Consecratione*, gives, in five *distinctiones*, the law bearing on Church ritual and the sacraments. For purposes of citation the following is the method generally adopted. A reference to the first part indicates the initial words or number of the canon, and the number of the *distinctio*; a reference to the second part gives the canon, *causa*, and *quæstio*; and a reference to the third part cites the canon, and the initial words of the *distinctio*.

Gratian had included in the Decretum the papal decretals down to the year 1139. During the following centuries the pontifical constitutions increased greatly in frequency. These constitutions went by the name of *Decretales Extravagantes* (*i.e.* Extra Decretum Gratiani Vagantes).

The second part of the Corpus Juris Canonici is composed of the following four collections of decretals:—

(*a*) Decretals of Gregory IX. promulgated in 1234. Its original name

was Libri Extra (sc. Decretum), which was abbreviated to X. for convenience in citation; *e.g.*, c. 9 X., 4. 13, refers to the 4th book of the Decretals of Gregory, title 13, chapter 9. This collection consists of five books, divided into titles and chapters. The laws are in the form of decisions pronounced in cases submitted to the Pope from all parts of Christendom, and among them are to be found several from England and Scotland.

(*b*) The *Liber Sextus*, published by Pope Boniface VIII. in 1298. In citing from the *Liber Sextus*, it is usual to give the number of the chapter, with the abbreviation "in vi^to^," or "in 6," the number of the book, and the number and rubric of the title.

(*c*) The *Clementinæ* are the decretals compiled and published by the direction of Pope Clement V. in 1313, and promulgated afresh by his successor, Pope John XXII., in 1317, under the name of Constitutiones Clementis Papæ V., or *Clementinæ*. It is cited by chapter, the words "in Clementinis," and the number of book and title.

(*d*) The *Extravagantes*. The more important of the decretals issued subsequently to the *Clementinæ* were published in two collections, the Extravagantes Joannis XXII. and the Extravagantes Communes. They are respectively cited by the words "Xvag Io XXII" and "Xvag Comm," in addition to the chapter, title, and book.

Throughout the Middle Ages the Church Courts absorbed many departments of civil jurisdiction. All matters connected in the most distant way with the Church or religious duties were dealt with by these tribunals. Thus the Church Courts took cognisance of all questions relating to marriage, succession, and legitimacy. Several causes conduced to the provisions of the canon law being extensively adopted by the law of Scotland. During the sixteenth and seventeenth centuries, the canon law was publicly taught in the Scottish Universities, and a wide jurisdiction was exercised by her Consistorial Courts, from which there was immediate recourse to the ultimate and paramount tribunal of the "Sacri Palatii Apostolici" at Rome. Our consistorial conclusions, *e.g.* decrees in processes of constitution of marriage, divorce *a vinculo*, qualified divorce, legitimacy, and bastardy, etc., profess at that period to be grounded upon *mandata ecclesiæ et sacros canones*, or *constitutiones sacrorum canonum*; while the Pope with us dispensed, either directly or by commission, with nearly the whole canonical restraints upon marriage and legitimacy. But though one of the Fontes Juris Scotiæ, the canon law was never of itself authoritative in Scotland. In the canons of her national Provincial Councils, Scotland possessed a canon law of her own, which was recognised by the Parliament and the Popes, and enforced in the courts of law. Much of it, no doubt, was borrowed from the Corpus Juris Canonici, but the portions so borrowed derived their authority from the Scottish Provincial Councils. "It appears to me," says Lord Robertson (Bell's *Rep. Put. Marriage*, p. 178), "that these Provincial Councils contain the whole body of the Scotch canon law, and that no part of the general canon law could be part of our law till such time as it was made part of the decrees or acts of that particular system of canon law." Even after the passing of the Reformation Statutes which abrogated the papal régime, and instituted a lay judicature with exclusive jurisdiction in all consistorial causes, the canon law was still cited in consistorial—or, as they were now styled, commissary—questions, and was constantly referred to and founded upon. Thus, in conformity with the canon law, the ignorance of both or of either party of a subsisting impediment to a marriage that they had solemnised *in facie ecclesiæ*, although by no means tending to uphold its validity, yet, in the event of it being judicially annulled, saved the

legitimacy of the issue (see Riddell, i. 452 *et seq.*). If, however, the marriage had been merely clandestine or irregular, it did not avail, nor did it avail if the public solemnisation *in facie ecclesiæ* had not taken place until after the discovery of the impediment. Another instance of adoption from the canon law is the law as to promise *cum copulâ*, which was taken from one of the decretals of Gregory IX. Similarly, cohabitation and habit and repute, which was held to be evidence of marriage by the canon law, was adopted as a rule of evidence by an Act of the Scottish Parliament. As to the authority of the canon law in regard to condonation of adultery, and the constitution and dissolution of marriage, see the opinion of Lord Watson in the case of *Collins* (1884, 11 R. (H. L.) p. 19).

By the canon law a marriage is void by the parties being related within the forbidden degrees, whether those degrees be degrees of blood or degrees of affinity. In the eighth century the Roman Church prohibited marriage between all within the seventh degree, but did not separate those married in the sixth degree, nor did it enforce this rule strictly in regard to those married in ignorance in the fifth or fourth degree. All impediments beyond the fourth degree were removed by the Fourth Lateran Council in the thirteenth century, which at the same time not only declared marriages within the fourth degree void, but also pronounced the issue of all such marriages illegitimate. The mode of computing degrees adopted by the canon law is, so far as regards the direct line, the same as that of the civil law,—the number of degrees being ascertained by counting the number of degrees up to and including the common stock. Thus a father and a son are only one degree distant from each other: and a grandson, by the same rule, is two degrees distant from his grandfather. In the oblique line, however, there is an important difference between the Roman and the canon law. By the latter system the computation of the degrees in the equal oblique line is not, as in the Roman system, by counting the number of generations on both sides, but simply the number intervening between either of the parties and the common stock. Thus, by the canon law brothers stand towards each other in the first degree, whereas by the Roman law they are related to each other in the second. By the canon law cousins-german are related to each other in the second degree, because they are only two degrees distant from the common stock, whereas by the Roman law they are related in the fourth. In the unequal oblique line, such as uncle and nephew, the number of degrees is found by counting the number of degrees between the party farthest removed from the common stock. Thus an uncle and nephew stand related to each other, like cousins-german, in the second degree, because the nephew who is farthest removed from the common stock stands in the second degree to the common ancestor. The prohibited degrees recognised by the old consistorial law of Scotland were the same as those prescribed by the canon law; but they can scarcely be said to have been adopted strictly by the Scotch Courts from that system, as they were made the subject of express enactment by the Provincial Council of 1242.

By the canon law a marriage is void which is contracted without consent, *i.e.* contrary to the declared wishes of the parents in the case of minors, or by such violence as precludes consent in the case of adults. Mistake and fraud also render marriage voidable, provided they are of such a nature as to prevent proper consent; but it is not voidable if consummation has taken place after the discovery of the mistake or fraud, because consummation under such circumstances implies consent.

It is the general teaching of the Western Church, that when once lawful wedlock has been contracted and consummated between Christians, it can

only be dissolved by the natural death of one of them, or his civil death by the solemn profession of religious life. In the case of adultery, the innocent party is required to separate from the guilty one until the proper term of penance has expired. It is then at his option to receive the offender back or not. In certain cases, however, *e.g.* where both parties are equally guilty, separation for adultery is not allowed. According to the Roman law, marriage between parties who had committed adultery was invalid, and the Church in early times adopted the same rule. But after the ninth century new opinions on this subject supplanted the old, and after being for a considerable time in doubt, the canon law was set at rest by the formal rescript of Innocent III. Unless, he says, the death of the spouse of the first marriage is brought about by either of the adulterers, or unless, while the first marriage existed, they had promised marriage to each other, the law will allow adulterers to marry each other.

Many of the rules of the canon law which were adopted by the old Consistorial Courts were largely modified at the Reformation. Thus divorce *a vinculo* was allowed, the 18th chapter of Leviticus was adopted as the law determining the degrees of relationship within which marriage should be legal; and several of the fictions of the canon law, resorted to for the purpose of creating an apparent reconciliation between equity and law, were abandoned. The Reformers, however, though they overturned all the Romish Consistorial Courts, enacted no new Consistorial Code, contenting themselves merely with declaring null all laws contrary to their religion. In all other respects the national canon law of Scotland was left untouched; and though several of its principles have since been altered or modified, it still remains the basis of the Scottish consistorial law.

[The best edition of the *Corpus Juris Canonici* is that by Friedberg, published at Leipzig in 1879. The early canon law of marriage is best studied in Freisen's *Geschichte des Canonischen Eherechts*. Of the later commentators, Sanchez is the most authoritative. Walter's *Kirchenrecht* is a useful compendium of the different ecclesiastical systems of law. The most recent English work on the subject is that of *Reichel*, published at London 1896. For a list of the leading authorities, see Fraser on *Husband & Wife*.]

Capacity.—See Contract; Marriage; Witness; Testament; Married Woman; Age; Pupil; Minor; Alien; Insanity; Criminal Responsibility.

Capita, Succession per.—Where succession devolves *per capita*, each individual entitled to succeed does so directly as the survivor or one of the survivors of a class, all taking equal shares. Thus take the case where *A.* has two children, *B.* and *C.*; and *B.* has two children, *D.* and *E.*; and *C.* only one child, *F.* In succession *per capita*, *B.* and *C.* take equally where both survive *A.* If one predeceases *A.*, the other takes the whole; where both *B.* and *C.* predecease *A.*, *D. E.* and *F.* take equal shares of the succession from *A.* Prior to the Moveable Succession Act, 1855, intestate succession in moveables operated only *per capita*, and the estate was divided amongst the surviving next-of-kin equally, excluding the representatives of those who had predeceased the intestate. The effect of that Act was not to alter the operation of intestate succession from succession *per capita* to succession *per stirpes*. It only introduced a limited right of representation in favour of the lawful child or children of a member of

the class taking in intestacy who had predeceased the intestate (18 Vict. c 23, s. 1]. When all the class, who would have taken in intestacy had they survived the intestate, have predeceased him, the next class taking in intestacy succeed *per capita*—each individual taking an equal share in his own right, not as the representative of a predeceasing parent (*Turner*, 1869, 8 M. 222). See STIRPES, SUCCESSION PER.

Capital and Income.—Questions involving the apportionment of an asset, or a liability, between capital and income, chiefly arise in accountings connected with the administration of a trust estate. Taking the question of the division of an asset, let us first see how an asset that comes to hand in the form of income is to be divided, where part of it is really capital. This is the case where there are what are known as "wasting" investments. In such a case, the whole termly proceeds of the investment are not to be regarded as income unless it is the manifest intention of the truster that they should be so regarded (*Howe*, 1802, 7 Ves. 137). It is very difficult to say what the Court will regard as an *indicium* of intention, as it arrives at the intention of the truster in each case from a perusal of the whole trust deed. (See the following recent cases dealing with leases of coal mines—*Ferguson*, 1877, 4 R. 532; *Strain's Trs.*, 1893, 20 R. 1025; *Campbell*, 1883, 10 R. (H. L.) 65; *Baillie's Trs.*, 1891, 19 R. 220; *Spencer*, 1862, 31 Beav. 334; *Thursby*, 1875, 19 Eq. 395.) Where the person interested in the income of the trust estate is not entitled to enjoy the produce of a wasting investment *in specie*, such an investment must be changed into one of a permanent character, and the produce of the new investment is the proper income of the estate (*Howe*, 1802, 7 Ves. 137). In questions of accounting arising between persons interested respectively in the capital and in the income of the estate, where conversion under the rule in *Howe* v. *Lord Dartmouth* has not taken place, the person interested in the income gets trust interest (*vide* INTEREST) on the realised estate in the hands of the trustees from the opening of the trust (*Dimes*, 1827, 4. Russ. 195; *Morgan*, 1851, 14 Beav. 72), and the remainder goes to the person interested in the capital (*Ferguson*, 1877, 4 R. 532, and see *Strain's Trs.*, 1893, 20 R. 1025).

Secondly, an asset may come to hand in the form of capital, when it is really partly income. This is the case with the falling in of a reversion of any kind. "To divide a given sum," says Kay, J., in a recent case, "being the proceeds of a reversion which has fallen in, between tenant for life and remainder-men, you must take the amount which, if put out at interest at the day of the testator's death, would, with compound interest, produce the sum which has so fallen in, give that amount to the remainder-men, and the rest goes to the tenant for life" (*re Hobson*, 1885, 63 L. T. 627, following *Earl of Chesterfield's Trs.*, 1883, 24 Ch. D. 643, and *Bacon*, 1869, 24 Ch. D. 649). Where part of the trust estate consisted of a life policy, subject to a mortgage, the trustees paid out of the general interest of the liferenter of the estate the premiums on the policy and the interest on the mortgage. When the policy fell in, less the sum in the mortgage, the reversion was divided by first of all paying to the liferenter the amount of the premiums and interest paid out of his liferent interest, with 4 per cent. interest thereon, and then paying the fiar the sum that, invested at the truster's death at 4 per cent., would, with compound interest, amount, at the date the policy fell in, to the balance of the sum then realised, the residue going to the liferenter (*in re Morley* [1895], 2 Ch. 738). One of the

commonest examples of a reversion is a bonus paid to the shareholders of a company. Whether this is to be regarded as capital or income depends on the following considerations. Where the company declaring the bonus has power to add to its capital, and pays a bonus out of accumulated profits, this bonus is to be regarded as income, even though the fund from which it is paid may have been used as floating capital, if the fund has not been formally added to capital (*Bouch*, 1887, 12 App. Cas. 385; *re Paget*, 1892, 9 T. L. R. 88). Where, on the other hand, the company has not power to add to its capital, if the bonus is paid out of a fund formed out of undivided profits, and applied to capital purposes, the bonus is to be treated as capital (*in re Alsbury*, 1890, 45 Ch. D. 237; *Irving*, 1803, 4 Pat. 521. As to bonus shares allotted as a dividend, see *Tindal*, 1892, 9 T. L. R. 24). Where a company, not having power to add to its capital, returns, in liquidation, the paid-up capital and something more, this surplus is to be treated as capital, though the surplus arises from an accumulation of profits not declared as dividends (*in re Armitage* [1893], 3 Ch. 337). Casualities, or fixed sums payable in lieu thereof, are capital, as is also a grassum (*Ewing*, 1872, 10 M. 678) and a duplicand (*Gibson*, 1895, 22 R. 889), unless where the estate has duplicands falling in every, or almost every, year (*Lamont-Campbell*, 1895, 22 R. 260). Where stock is sold carrying a partially accrued dividend, this dividend goes to capital; but, on the other hand, where stock in a similar condition is bought, the dividend attached is payable out of capital (*Scholefield*, 1863, 2 D. & Sm. 173; *Freman*, 1865, 1 Eq. 266).

Next to be dealt with is the apportionment of liabilities and outlay. In general the whole expense of protecting the trust estate, in so far as not specially incurred for the benefit of the person interested in the income, is a charge against capital. Such is the rule concerning the apportionment of the expenses of changing trust investments (*Smith*, 1890, 18 R. 44), and of defending an action "in the nature of a blow directed against the existence of the trust" (*Baxter*, 1864, 2 M. 915). Calls on shares, not fully paid up, fall to be paid out of capital, unless otherwise directed (*Bevan*, 1876, 3 Ch. D. 752). As to premiums of insurance against fire, the usual practice is to charge one half against capital. There does not appear to be any direct authority on this point in Scotland, either at common law or by Statute. In England there is statutory authority to charge three-fourths against income (56 & 57 Vict. c. 53, s. 18).

Repairs to property to keep up the lettable value, or to plant to keep it in an efficient working state, are charges against income. Improvements of a permanent nature on property, or renewal of working plant, are charges against capital. Depreciation of capital value, through plant becoming out of date or such like, is a charge against capital (*Ellis*, 1895, 22 R. 764; *in re Courtier*, 1886, 34 Ch. D. 136). In the case of the liferent of a stocked farm, it is the duty of the liferenter to keep up the stock on the farm, by replacing animals that have died and implements that have been worn out (*Rogers' Trs.*, 1867, 39. Sc. Jur. 602, see L. P. Inglis' opinion for full discussion of question).

Where a furnished house is liferented by a beneficiary, feu-duty, assessments on property, and repairs of pavement, roof, and walls, fall on capital. Against income are chargeable assessments on occupancy, including inhabited house duty, and the share of those taxes which are divisible between landlord and tenant. The custom in leases of furnished houses, that the landlord pays the tenant's taxes, has no application here (*Clark*, 1871, 43 Sc. Jur. 213, see opinion of L. P. Inglis; cf. *Earl of Cowley*, 1866,

35 Beav. 635). Loss made in carrying on a business is a charge against income, and must be made good out of future profits, though the holder of the liferent interest may not then be the same person (*Upton*, 1884, 26 Ch. D. 588).

On the failure of a loan on security, the sum recovered should be divided between capital and income in proportion to the amounts which ought to have gone to either, the income being debited after the division with what has actually been received (*in re Foster*, 1890, 45 Ch. D. 629; but cf. *in re Moore*, 1885, 54 L. J. Ch. 432, and *in re Ancketill's Estate*, 1891, 27 L. R. Ir. 331).

In ordinary commercial transactions, the terms capital and income are variously interpreted, according to the nature of the business and the views of the persons interested. Where the same persons or person are interested in the whole estate, capital and income, it is a mere question of book-keeping as to what is called capital and what income. In the case, however, of a company formed under the Companies Acts, the Court will interfere to prevent the company dissipating its capital to the injury of its creditors under the guise of declaring dividends from profits. This does not prevent a company owning a "wasting" subject from declaring the actual gross profits of the year as dividend. If it has been honestly earned within the year, the company is not bound to put aside a sinking fund to replace capital wasted in the legitimate operations of the company. "There is nothing in the Companies Acts," says Lindley, L. J., "to show what is to go to capital account or what is to go to revenue account. We know perfectly well that business men very often differ in opinion about such things. Such matters are left to the shareholders. They may or may not have a sinking fund or a deterioration fund, and the articles of association may or may not contain regulations on these matters. If they do, the regulations must be observed; if they do not, the shareholders can do as they like, so long as they do not misapply their capital and cheat their creditors" (*Lee*, 1889, 41 Ch. D. 1, at p. 25).

Capital Punishment.—Under our former law, crimes which were regarded as of a "high and atrocious" nature, were punished capitally. Such were murder, incest, rape, robbery, *furtum grave*, forgery, wilful fire-raising, etc. It was also a capital offence, by 5 Geo. IV. c. 84, to return to the United Kingdom before a sentence of transportation or banishment had expired, but this penalty was abolished by 4 & 5 Will. IV. c. 67. The Act 5 & 6 Will. IV. c. 81, substituted transportation in place of death as the punishment for letter-stealing and for sacrilege, which had been made capital crimes by 52 Geo. III. c. 143; 7 & 8 Geo. IV. c. 29, and 9 Geo. IV. c. 55. The Act 7 Will. IV. and 1 Vict. c. 84, abolished capital punishment in cases of forgery; and an Act of the same year (c. 91) provided that certain other offences, formerly capital, should no longer be punished by death. Even in the case of those crimes which remained capital at common law, the practice came to be that the penalty of death was never imposed, save in cases of murder. Eventually, by the Criminal Procedure Act of 1887 (50 & 51 Vict. c. 35, s. 56), the punishment of death has been limited to murder and attempts to murder under 10 Geo. IV. c. 38. The Act of 1887 does not alter the law as to treason (s. 75), which therefore still remains a capital offence.

1. *The Sentence of Death.*—Inferior judges have no power to pronounce sentence of death. This penalty can be imposed only by a judge of the

High Court of Justiciary. The sentence can proceed only upon a plea of guilty to a charge of treason, murder, or attempt to murder under the Statute of Geo. IV., or upon a verdict of guilty returned under such a charge. As in the case of every other criminal trial, both prosecutor and panel must be present when the verdict is returned and sentence pronounced, and the panel must then be sane and sober. If he is intoxicated, sentence will be delayed till he becomes sober. If his mind seems to be impaired, sentence will be delayed till it be ascertained whether his condition is permanent or temporary. If it is ascertained that the accused is suffering from incurable insanity, sentence of death will not be pronounced, but the judge will order the accused to be detained during the Royal pleasure. Sentence, in the case of a capital crime, will also be delayed if the accused is a female who is pregnant. If pregnancy is pleaded by the accused, the Court remits to skilled persons to report upon oath as to her condition. If, on their first visit, they are in doubt as to her condition, they may be ordered to make a second inspection, and to report anew by a certain day, to which the diet for pronouncing judgment has been adjourned.

By the ancient practice of the Court of Justiciary, the sentence of death, after it had been read out by the clerk of court from the record, was repeated by the doomster or common executioner. The Act of Adjournal of 16th March 1773 abolished this ceremony, and enacted that the sentence shall be pronounced by the presiding judge, and afterwards read out by the clerk from the record. The judge signs this part of the record. In pronouncing sentence of death, the judge assumes the black cap.

At first the date of execution was not set forth in the sentence, it being left to the discretion of the inferior magistrate, who was to carry out the sentence, to appoint the time of execution. By 11 Geo. I. c. 26, it was provided that no sentence importing corporal pains should be executed within less than thirty days after its date, if pronounced south of the Forth, or within less than forty days, if to the north of that river. By 3 Geo. II. c. 32, any punishment short of death might be inflicted after eight days, or twelve days, from the date of judgment, according as it had been pronounced to the south or to the north of the Forth. Finally, by 11 Geo. IV. and 1 Will. IV. c. 37, it was enacted that the day of execution of a sentence of death, southward of the Forth, must not be less than fifteen, nor more than twenty-one days after the date of the sentence; and northward of the Forth, not less than twenty, nor more than twenty-seven days.

Every sentence of death, therefore, must now name the day of execution. If a day within the statutory period be fixed, this error does not vitiate the sentence, but may be corrected by the Court. At common law, too, the Court of Justiciary has power to respite a convict, or to alter the date of the execution in exceptional circumstances demanding such action.

Hume is of opinion (i. 475) that, if the date fixed for the execution is allowed to pass without the sentence being carried out, or if the executioner fail to execute the convict to the death, the latter is entitled to receive his freedom.

2. *Execution of Capital Sentence.*—The warrant for the execution is the sentence of the judge who tried the convict, and, on this warrant being presented to the governor of the gaol wherein the condemned man is incarcerated, he is bound to hand him over to those who are charged with carrying out the sentence. In Scotland, the sentence is carried into

execution either by the magistrates of the burgh, or by the sheriff of the county, according as the execution is to take place within the burgh or county jurisdiction. Warrant from the Crown is unnecessary in the carrying out of a capital sentence. The Crown only interposes, in the case of a person condemned to death, for the purpose of pardoning or respiting the convict, or of mitigating the punishment.

By the Act 31 & 32 Vict. c. 24, capital punishments for murder are to be carried into effect within the walls of the prison in which the offender is confined at the time of execution (s. 2). Only officials and relatives are to be present (s. 3). The body of the person executed shall be buried within the walls of the prison within which judgment of death is executed on him (s. 6).

At common law, escheat of the convict's moveables to the Crown follows the execution of every capital sentence (Hume, i. 463; Alison, ii. 655). See Arbitrary Punishment.

Capitis diminutio.—In Roman law *caput* or *status* was used to denote a man's legal capacity, the aggregate of rights, public and private, which he enjoyed under that system. The extent of these rights was determined by the legal standing (*status*) of the particular individual as regards (1) freedom, (2) citizenship, (3) *familia*; these were the successive steps in an ascending scale of privilege. Slavery being a recognised institution which excluded personality altogether, the primary condition of legal capacity was freedom; but the law peculiar to Rome (*jus civile* in the narrower sense), being a law for citizens, did not extend to the freeman as such, *e.g.* to the alien—the only rights open to him were those based upon the *jus gentium*. If a man was not only free, but a burgess, the circle of his rights was greatly extended, for citizenship was of supreme importance in private as well as in public law; it was the qualification for holding property, contracting a marriage, or making a will under the sanction of the *jus civile*, no less than for the franchise and for public office. To enjoy the fullest measure of private rights (*e.g.* to be entitled to agnatic tutory and succession), it was further necessary that the citizen should be a member of a Roman family; and it made a great difference to his proprietary capacity what position he held in it—whether he was *pater familias* or *filius familias*.

Capitis diminutio is defined as *prioris status commutatio*. It was the loss of the position one had held in any one of these three circles—the loss of any of the constituent elements of a complete legal personality. Accordingly, it was of three degrees, the greater always including the less: (1) *c. d. maxima*, loss of freedom, as when a citizen was taken prisoner of war or was condemned to penal servitude for a crime; (2) *c. d. media*, loss of citizenship, as when a Roman burgess settled in a foreign State or a Latin colony, or was condemned to banishment (*aquae et ignis interdictio* or *deportatio*) for crime; (3) *c. d. minima*, change of family, as when a *filius familias* was emancipated or given in adoption, or a person *sui juris* was adrogated. There was obviously a total loss of capacity in the first case, and a serious curtailment of it in the second; and Savigny (*Syst.* ii. App. 6) contends that there was a civil degradation in the third case also, a descent from a better family position to a worse; but the more general opinion is, that it was simply a transit from one family to another, with the result that the old ties of agnation were broken, and the old personality vanished.

The general effect of the loss of a specific *status* was forfeiture of the

rights incident to that *status*: thus if a citizen fell into slavery, his marriage was dissolved: if he became an alien, it ceased to be a civil-law marriage (*justæ nuptiæ*), because *connubium* was lost, but it might continue as *matrimonium juris gentium*. In particular, it may be noted that, by the civil law, loss of *status* invalidated a will previously executed, for the capacity of the testator must be continuous from the date of execution until death (*Inst.* ii. 17. 4): and it operated an extinction of the debts due by the *capite minutus* (Gaius, *Inst.* 3. 84); but the prætorian law gave relief from the harsher consequences of these rules. *Minima c. d.* put an end to the tutory of an agnate, and to all rights of succession in the character of agnate. Lastly, *c. d. maxima* and *media* dissolved a partnership, civil death being here equivalent to natural death (Gaius, 3. 153).

[*Inst.* i. 16, and *Dig.* iv. 5, are the leading titles dealing with this subject.]

Caption.—See Diligence (against the Person); Imprisonment (Civil).

Caption, Process.—Process caption is the proceeding by which a practitioner who borrows a document in the hands of the Court may be compelled to return it, if unduly or improperly retained by him. It is a summary warrant of incarceration, which is granted as of course upon complaint by the clerk that any of the steps of process, or the productions lodged, have been borrowed or abstracted by either agent, and are not returned when due. Caption is usually issued at the instance of the person who desires the return of the papers, but it may be taken out at the instance of the clerk, or be granted by the judge *ex proprio motu*. It is directed against the agent and the clerk whose receipt stands for the borrowed documents. When an application for caption is to be made at the instance of the agent, forty-eight hours' notice of his intention is usually given by him by letter to his antagonist, and if the documents are not returned to the process within that time the Clerk of Court is moved to issue caption. He marks upon the inventory of process that caption has been craved for the numbers borrowed, and intimates this to the borrowing agent, requesting him to return the documents within forty-eight hours. Should the latter fail to do so, a complaint in the following terms is made out by the clerk and presented to the judge or Court (in vacation or recess to the Lord Ordinary on the Bills):—

Complains *A. B.*, one of the Depute Clerks of Session upon Messrs. *C.* & *D.*, W.S., and *Mr. C.* and *Mr. D.*, the individual partners of said firm, and *E.* their apprentice, for not returning the process (or Nos. thereof), *in causa F.* v. *G.*, for which the said *C. D.* and *E.*'s receipts stand. (Signed) A. B., *D.C.S.*

A warrant is then issued in the following terms:—

Edinburgh [*Date*].—The Lord Ordinary grants warrant to macers of Court to apprehend and incarcerate the persons of the said *C. D.* and *E.*, aye and until they return the said process (or Nos. thereof), with expenses of caption.

[*Signature of Judge.*]

This is executed by a macer of the Court, under direction of the clerk, and if the papers are not delivered to him, the macer may apprehend and imprison the agents and clerk who borrowed the documents. It is not usual, however, to execute the caption against the clerk. Caption may also be used

where a step of process has been illegally taken possession of without a borrowing receipt, and in this case it is not necessary to give the forty-eight hours' notice. The law and practice of process caption are fully expounded in the case of *Watt* v. *Thomson & Ligertwood*, 1868, 6 M. 1112; 1870, 8 M. (H. L.) 77; 1873, 11 M. 960; and 1874, 1 R. (H. L.) 21. As the foundation of the process is contempt of Court, real or presumed, caption is not the proper remedy where the process has been lost or destroyed, though an action of damages may be raised: nor is it competent when a long period has elapsed since the process was borrowed (*Horne*, 1825, 3 S. 550; *M'Leod*, 1826, 5 S. 1). In such circumstances an order may be got from the judge upon the agent to return the papers; or an action for delivery may be raised. When caption has been irregularly or improperly issued it may be suspended, and as it is granted *periculo petentis* an action of damages will lie against the party on whose behalf it was applied for, and his agent (*Pearson*, 1833, 11 S. 1008; *Hunter*, 1842, 4 D. 1175), and, in cases of malice or irregularity, against the Clerk of Court, but not against the judge, acting judicially, unless there is an averment of special malice (*Watt*, *supra*), or against the macer, if the warrant is in proper form, as he is bound to execute it (*Pearson*, *supra*). In the Sheriff Court, caption may be used to force the return of documents to process under similar conditions (Dove Wilson, *Sheriff Court Practice*, 286).—[See Mackay, *Practice* i. 453, *Manual*, 232; Coldstream, *Procedure*, 23; Stair, iv. 47. 23; Ivory, *Process*, i. 181; Beveridge, *Process*, i. 250; Shand, *Practice*, 286, 512.] See Borrowing Process.

Captive.—See Prisoner of War.

Capture.—See Admiral; Admiralty (Scottish Court of); Prize-Law.

Card-sharping.—Cheating or sharping by means of cards is punishable at common law as a species of fraud (Macdonald, 84; *Clark*, 1859, 3 Irv. 409). In the case of *Clark* certain confederates were, at common law, found guilty of falsehood, fraud, and wilful imposition, inasmuch as they had got money from a stranger in a railway carriage by one of them pretending to have lost money to another at cards, and begging a loan to help him to recover his losses. Card-sharping is also criminal by Statute. By the Prevention of Gaming (Scotland) Act, 1869 (32 & 33 Vict. c. 87), it is provided (s. 3) that "all chain-droppers, thimblers, loaded-dice players, card-sharpers, and other persons of similar description, who shall be found in any public place, or in any grounds open to the public, or in any public conveyance, in possession of implements or articles for the practice of chain-dropping, thimbling, loaded-dice playing, card-sharping, or other unlawful gaming, or who shall in any such place, grounds, or conveyances, exhibit such implements or articles in order to induce or entice any person to engage in any such game, or who, by any such fraudulent act or device, shall cozen and cheat or attempt to cozen and cheat any person in any public place or in any grounds open to the public, or in any public conveyance, may be convicted before a magistrate [including the Sheriff and Sheriff-Substitute of the county (s. 2)] on the testimony of one or more credible witness or witnesses, and on conviction shall be imprisoned, with or

without hard labour, for any term not exceeding sixty days, and shall also at the same time be sentenced to repay any money or restore any property which they may have obtained by means of any such offence, and failing such payment or restoration may, under the same procedure, be committed to or detained in prison, with or without hard labour, for any further term not exceeding sixty days." The Act further provides (s. 4) that "every prosecution for any offence against the provisions of this Act shall be raised and proceeded in under the provisions of the Summary Procedure Act, 1864, and at the instance of the procurator-fiscal of the Court having jurisdiction under this Act." See GAMING.

Care.—See NEGLIGENCE.

Carrier.—A carrier is one who undertakes to convey for hire, goods, animals, or passengers, from a place within the realm to a place within or without the realm.

The infrequent case of a gratuitous carrier need not be referred to at length. It is sufficient to note that a gratuitous carrier is only liable for gross negligence. If he takes the same care of the goods which he has undertaken to carry as he does of his own, there is a presumption in his favour; but that presumption may be rebutted by evidence of actual negligence, or of conduct which, though it affected the goods he undertook to carry as well as his own, would be deemed negligent in a man of ordinary prudence.

This article relates chiefly to the application of the principles of law affecting all carriers, to the case of carriage by land; the case of carriage by sea being treated under the article SHIP. Reference is also made to the articles CANAL and RAILWAY, where the subject of carriage by canal or railway and the statutory enactments which in these cases modify and supersede the common law rights and duties of a land carrier are fully treated.

The contract of carriage may be viewed (1) as relative to goods, including passengers' luggage and animals, and (2) as relative to persons.

CARRIAGE OF GOODS.—This contract, which is the *locatio operis mercium vehendarum*, is for the safe carriage of commodities and their delivery in good condition, in consideration of a hire stipulated or implied. The contract may be express, when the carrier's obligations depend upon the terms of the agreement, or implied from his receipt of goods for carriage. When the carrier has accepted goods delivered to him for carriage, the obligations incumbent on him are (1) the obligations under the contract, and (2) in the case of common carriers only, obligations imposed under certain rules of public policy.

Obligations under the Contract.—Under the contract the carrier is held to undertake (1) that the vehicle shall be sufficient for safely carrying the goods; (2) that the goods shall be properly packed and placed in the vehicle; (3) that ordinary care and the regular course of the journey shall be observed in the transit; and (4) that the goods shall be delivered according to the undertaking. In the event of the goods being lost or injured, the presumption is against the carrier on all these points, and the burden is laid on him of proving that the loss or injury arose from some cause for which he is not responsible.

The vehicle must be sufficient for the safe conveyance of the goods. This sufficiency extends not only to the vehicle itself, but to all its access-

ories. Thus, in land carriage, the tackle, harness, horses, drivers, drays, etc., and in railways, the permanent way, signals, signalmen, etc., must be sufficient. The carrier, however, is not liable for latent defect. It is enough to free him from liability if the vehicle and its accessories be sufficient so far as the eye can discover (*Christie*, 2 Camp. 79; *Cargill*, 11 D. 216). So also in sea carriage, not only must the vessel itself, hull and rigging, be tight, staunch, and strong for the voyage, but it must also be properly manned and navigated, and be provided with all stores and documents necessary for the voyage. See also the article on SHIP.

The goods must be properly packed and placed in the vehicle (*Paxton*, 9 M. 50), unless the consignor has undertaken this responsibility himself (*Rain*, 7 M. 439). The consignor, however, must pack or secure the goods so as to withstand the necessary movement and concussion of the journey, and any neglect on his part to fulfil this duty will free the carrier, unless the neglect was apparent, and such as the carrier with ordinary diligence could notice and remedy (*Stuart*, 2 Starkie, 323). In the case of dangerous goods, the sender's duty is to specify their nature (*Cramb*, 19 R. 1054). The goods must not be placed in an overloaded vehicle (*Israel*, 4 Espin. 259).

The carriage must be performed with the skill and care necessary for safety, and the carrier must take all reasonable precautions against injury from concussion and explosions (*Siordet*, 4 Bing. 607), or from the weather (*Robinson*, 2 B. & P. 416), or from depredation (*Batson*, 4 B. & Ald. 32; *Pearcey*, 10 R. 564). He is bound to take all reasonable precautions which do not involve any unusual expenditure, and the providing of which does not involve any exceptional sagacity or foresight. But he is not responsible for damage arising from wholly unusual and unexpected causes, and the onus is on him to prove such unusual cause (*Ralston*, 5 R. 671; *Anderson*, 2 R. 443).

The regular course of the carrier's journey must be observed (*Davis*, 6 Bing. 716). He is bound to carry the goods by the route which he professes to be his route, and not necessarily by the shortest route (*Hales*, 32 L. J. Q. B. 292; *Myers*, L. R. 5 C. P. 3). Should the carrier deviate from his usual route unnecessarily, and the goods be lost, even by inevitable accident, he is liable (*Davis*, *cit.*).

A carrier is bound to forward goods in due course, *i.e.* with reasonable speed, and this applies especially in the case of perishable goods. He is not responsible for the consequences of delay arising from causes beyond his control (*Finlay*, 8 M. 959), and his primary duty being to carry safely, he is justified in incurring delay, if delay be necessary to secure safe carriage (*Taylor*, L. R. 1 C. P. 385). He is not bound, in unusual circumstances, such as obstruction by a fall of snow, to use extraordinary means for accelerating the conveyance (*Buddon*, 28 L. J. Ex. 51); but if he has knowledge of any unusual cause of delay, he is bound to give notice to the sender on receiving the goods (*M'Connachie*, 3 R. 79).

The contract which the carrier undertakes is one contract from beginning to end. Therefore the porters or carters whom he employs are his servants for whom he is responsible, whether porterage be payable or not, or whether it is payable for his behoof, the porter getting only a proportion, or whether he has only the election of a porter (*Armstrong*, 3 S. 464). In some earlier cases, it was held that where the carrier does not go all the length to which the goods are to be carried, then, if the conveyance is to be completed by another carrier independent of the first, delivery to that carrier or to persons empowered to act as his agents or servants in taking delivery of goods, will discharge the original carrier (*Denniston*, Bell, Oct.

Ca. 260; *Bates*, 18 D. 186). But in later cases it has been held that in the absence of special stipulations a carrier receiving goods to be conveyed to a place beyond his terminus is responsible for their safe carriage during the whole of their transit, even though during part of the way they should be conveyed by another carrier, the latter being regarded as the agent of the original carrier (*Cal. Ruy.* 20 D. 1097; *Metzenburg*, 7 M. 919).

The carrier's responsibility ceases with delivery of the goods, according to his undertaking. But his undertaking must be exactly fulfilled. Thus delivery on board the wrong vessel (*Gilmour*, 15 D. 478), and such delay in despatching goods which were "to be conveyed to Liverpool for American steamer," as caused the goods to be late for that steamer (*Bates*, 18 D. 186), subjected the carrier to liability. The general rule is, that the carrier is not discharged of the goods while anything remains for him to do as carrier (*Bishop*, 8 Sh. 558). This may be regulated by custom or by special agreement, or by implied agreement, as by force of the address on the goods, for the natural implication is, that the parcel shall be delivered to the person named, and at the place mentioned in the address. If there be no special address given, or if there be no undertaking by the carrier to deliver them at the consignee's door, he must give to the consignee notice that the goods have arrived, and wait his orders (*Goldin*, 2 Black, Rep. 916).

The goods must be delivered either to the person indicated in the contract, or according to the address. Should the address be defective, any loss arising therefrom falls on the consignor, and not on the carrier (*Caledonian Railway*, 20 D. 1097). A carrier may deliver the goods to anyone properly authorised by the consignor to receive them, and if there be no special direction as to the place of delivery, he is discharged by delivering them to a named consignee, who demands them at another place than that to which they are addressed (*Cork Distilleries Co.*, L. R. 7 H. L. 269). The carrier, until he has parted with the goods to the consignee, is bound, if so ordered by the consignor, to refrain from delivering them, and to retain the goods, or deliver them elsewhere, as the consignor shall direct. This privilege of stopping goods *in transitu* is fully dealt with in the article STOPPAGE IN TRANSITU.

Should the carrier be unable to find the consignee, or should the latter refuse to take delivery, the carrier is then liable for the safe custody of the goods and their re-delivery according to the sender's order (*Metzenburg*, 7 M. 919). But while the goods are waiting the consignor's orders, the carrier is liable only as a custodier and not as a carrier (*Hyde*, 4 Term. Rep. 58).

The carrier's obligation to deliver under his contract is discharged by the destruction or loss of the goods, whether that arises from a cause for which he is not responsible, or from internal defect or some peculiar peril of the article carried, or even if the loss is caused by the carrier's own act, when he is compelled to it by manifest necessity, as jettison to save life in crossing a ferry (2 Kent, 604). When the consignee finds that the goods are damaged, he should refuse to take delivery. In cases where the damage is only ascertained after unpacking the goods, he should at once intimate the fact to the carrier or his known agents. He is not barred from recovering damages by breaking bulk, though his doing so without notice may be an element to be considered in weighing the evidence (*Johnston & Sons*, 3 R. 202). By delay in giving notice of damage after receipt, he will be barred from objecting to the condition of the goods (*Stewart*, 5 R. 426).

Obligations under Public Policy.—The ordinary rule of responsibility, under the obligations of the contract, is enlarged in certain cases, supposed

to be peculiarly exposed to the danger of collusion and carelessness. The rule is, that common carriers are subject to the Edict *Nautæ, Cauponæ*, etc., by which they are held to insure the safe delivery of goods committed to their charge, and are responsible for any loss or damage, although no neglect can be proved, if such loss do not arise from natural and inevitable accident, the act of God or of the king's enemies.

This extreme responsibility applies only to the carriage of goods by a carrier publicly professing the business of common carrier. A common carrier is one who undertakes for hire to convey from a place within the realm to a place either within it or without, the goods or money of all who think fit to employ him in the business which he professes to ply.

Thus railway and canal and navigation companies are common carriers so far as regards goods, but their responsibility is now, to a large extent, regulated by Act of Parliament. See RAILWAY. So also are the owners and masters of ships trading regularly from port to port for the transportation of goods for hire; also ferrymen and proprietors of barges, lighters, canal and other boats carrying goods for the public generally. Waggoners, carriers, mail and stage-coach owners, are also common carriers, and so are carters and porters who offer themselves for hire to carry goods from one part of a town to another. Hackney coachmen are not within the rule unless when employed as carriers and paid for carriage (*Upshore*, Comyn's Rep. 25), but the acceptance of luggage by a cabman implies a promise to carry safely, with a corresponding liability (*Ross*, 2 C. B. 877). A person who conveys passengers only is not a common carrier, nor is a carrier who enters into an express contract of carriage in a particular case, nor is the Postmaster-General, for in the case of the Post Office this rule of public policy has been superseded by other precautions, viz. the appointment of public officers whose fidelity in their office is secured by Statutes of exceptional rigour.

To render a person liable as a common carrier, he must profess the business of carrying goods for all persons indiscriminately as a public employment, and must hold himself out either expressly or by a course of conduct as ready to engage in the carrying of goods for hire as a business, and not merely as a casual occupation. He need not profess to carry all kinds of goods, but may limit his business to the carriage of any particular class of goods.

A common carrier is bound to receive and carry the goods, provided they are of the description he professes to carry, of any person offering to pay his hire. Should he refuse without reasonable excuse, he will be liable in an action of damages.

This duty, however, does not arise until he is ready to set out on his accustomed journey (*Lane*, 1 Lord Raymond 652), nor if his conveyance be already full (*Riley*, 5 Bing. 217). He may also refuse to carry, as a common carrier, certain commodities whose carriage is attended with inconvenience or some peculiar risk (*Johnson*, 4 Ex. 371), but this does not prevent him from accepting and carrying them under a special contract (*Wood & Co.* 20 R. 602, p. Lord Young). It has thus been held that a refusal to carry was reasonable when it appeared that it was a time of public commotion, and that the goods which the carrier was desired to carry were the object of a public fury, and would be attended with a risk against which the carrier's precautions would be inadequate to secure him (*Edwards*, 1 East. 604).

So also in the case of goods of great value, if it appeared that he had no convenient means of carrying such articles with security (*Batson*, 4 B. & A. 32). For "the carrier's duty to receive is always limited to his convenience

to carry" (*M'Manus*, 28 L. J. Exch. 353, p. Erle J.) He may also refuse goods insufficiently packed or in a state unfit for carriage; but if such defect be manifest, and he notwithstanding accepts the goods, he is responsible even if damage should arise from that cause (*Stuart*, 2 Starkie, 323).

Further, by Statute, provisions are made as to the carriage of certain goods. By "The Carriage and Deposit of Dangerous Goods Act, 1866" (29 & 30 Viet. c. 69, s. 6), it was provided that no carrier was bound to receive or carry any goods defined by that Act as specially dangerous. That Act was repealed by "The Explosives Act, 1875" (38 Viet. c. 17), which deals with gunpowder and other explosives, defined by sec. 3 to mean gunpowder, nitro-glycerine, dynamite, gun-cotton, blasting-powders, fulminate of mercury or of other metals, coloured fires, and every other substance, whether similar to those above mentioned or not, used or manufactured with a view to produce a practical effect by explosion or pyrotechnic effect, and to include fog-signals, fireworks, fuzes, rockets, percussion-caps, detonators, cartridges, ammunition of all descriptions, and every adaptation or preparation of an explosive as above defined, and also with any substance declared by Order in Council to be specially dangerous, and to be deemed an explosive within the meaning of the Act. By an Order in Council of August 5, 1875, picric acid and its compounds were declared explosives. This Act does not repeat the provision in favour of common carriers contained in the earlier Act, but it provides (sec. 33) general rules for the conveyance of gunpowder, and ordains (sec. 34) harbour authorities, (sec. 35) railway and canal companies, (sec. 36) occupiers of docks and wharves, and (sec. 37) the Secretary of State in all other cases, to make bye-laws for, *inter alia*, the conveyance of gunpowder. Such bye-laws by the Secretary of State were made and published in the *Edinburgh Gazette*, December 10, 1875, p. 913. By sec. 39, these rules and bye-laws are, *mutatis mutandis*, to apply to the other explosives covered by the Act.

A common carrier is entitled to have his hire paid to him before he takes the goods into his custody, the receipt of the goods by the carrier, and the payment of a reasonable sum for their carriage, being contemporaneous acts. But the hire demanded must be reasonable, and what is reasonable depends upon the character and value of the goods. The carrier is entitled to make a higher charge for the greater risk attending the carriage of valuable, perishable, or fragile goods. In the event, however, of a reasonable hire being refused, or of goods being offered which he does not commonly profess to carry, a common carrier may make a special contract of carriage exactly as a private carrier may.

The responsibility of a common carrier commences when he is charged with the goods by their complete delivery to him to be forwarded, and continues until they reach their final destination. The delivery must be to the carrier himself, or to someone permitted (*Burrell*, 2 Car. & K. 680) or authorised to act for him (*Bain*, 3 S. 533) in receiving goods for carriage (*Blanchard*, 3 Barb. 388); and when he or his agent personally accepts the goods, delivery is complete, no matter where it is made (*Boehm*, 2 M. & S. 172; *Phillips*, 8 Pick. 182; *Clayton*, 3 Camp. 27). If the goods are delivered at the usual place of receiving such articles, and notice is given to the carrier or the proper servant, there is held to be constructive acceptance, and the delivery is complete. If the carrier directs that goods should be left at a particular booking-office, or if it has been his constant usage and practice to receive and carry goods left at a particular place without special notice to him of such deposit, delivery there will be enough to charge him with the custody (*Colpepper*, 5 Car. & P. 380; *Merri-*

man, 20 Conn. 354). On the other hand, when goods were left in the yard of an inn where other carriers also put up, and no actual delivery to the carrier or his servant was proved, the carrier was not held to be charged with the goods (*Selway*, 1 Raym. 46); nor was a wharfinger, where goods were handed to an unknown person at his wharf, and no knowledge of the fact was brought home to him or his agents (*Buckman*, 3 Camp. 414). It is not necessary that the goods should be entered upon any freight list or way-bill, nor is writing necessary to constitute or prove the contract (*Parker*, 7 M. & G. 253); but if the goods are entered, the carrier is bound (*Phillips*, 8 Pick. 182). It is no delivery to the carrier if goods are placed in his vehicle without his knowledge or consent (*Lovett*, 2 Show. 127).

Where the carrier delivers a ticket or other notice to the person from whom he receives the goods specifying the terms on which he agrees to carry, and the customer assents or does not dissent, the terms of the notice will establish a special agreement, and will exclude his liability as a common carrier (*Zunz*, L. R. 4 Q. B. 539; *Word*, 20 R. 602); but the evidence of the sender's knowledge of the notice must be clear (*Macrae*, 14 R. 4). If the customer in such a case declines the terms, and wishes to fix the carrier with liability as a common carrier, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods (*Garton*, 30 L. J. Q. B. 273).

The Prætor's Edict, the terms of which are, "Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituant, in eos judicium dabo" (*Dig.* iv. 9. 1), has been adopted in Scotland, as in most of the European nations who have recognised the Roman law. In England the same principle is followed, but there it is referred to the custom of the realm.

Although *Nautæ*, strictly speaking, comprehends only carriers by water, the principle of the law has been extended to carriers by land, if they are *common* carriers (Bankt. i. 16. 5; Ersk. iii. 1. 29; *Ewing*, M. 9235; *M'Ausland*, M. 9246).

The principle of the Edict is, that in addition to the carrier's liability under his contract for all due care and diligence, he is further held to be of the nature of an insurer, and is liable for every accident, except by the act of God or the king's enemies. Neither robbery nor theft is held to be a sufficient answer for the carrier, as these are the main dangers which this severe law is intended to prevent. Fire was in Scotland held to be an act of God so as to free the carrier from responsibility, unless where fraud or collusion could be shown. But the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60, s. 17), provides that "all carriers for hire of goods within Scotland shall to liable to make good to the owner of such goods all loses arising from accidental fire while such goods were in the custody or possession of such carriers." That the loss was caused by the fraud or negligence of servants is no answer. Servants are identified with the master, the policy of the law being to protect against them and all possibility of collusion (*Garnet*, 5 Barn. & Ald. 53).

The value of the goods lost may now be proved *prout de jure* (*Campbell*, 24 Jur. 455), and the general rule as to the measure of damages is the market price of the goods at the place of delivery (*Rodocanachi*, 18 Q. B. D. 67); but the rule is not absolute, and in each case the whole facts are looked at so as to give the consigner fair compensation for his loss (*Warin & Craven*, 4 R. 190; *Keddie, Gordon, & Co.*, 14 R. 233; *Sutton*, 16 R. 814).

The severity of the responsibility thus put upon common carriers induced the admission of a limitation in the case of valuable goods by means of

notices and advertisements on the principle of implied assent. But the various and difficult questions which arose as to the construction of such notices, and as to their communication to the parties, led to the passing of the Carriers Act, 1830 (11 Geo. IV. and 1 Will. IV. c. 68).

By that Act (s. 4) the liability of mail contractors, stage-coach proprietors, or other common carriers by land for hire, is declared to be in no way limited or affected by any public notice or declaration, but to continue for the loss or injury to any goods in respect of which they are not entitled to the benefit of the Act. Sec. 5 leaves untouched the power of the carrier to enter into special contracts limiting his responsibility; but to deprive the carrier of the protection of the Act, the provisions of the special contract must be consistent therewith (*Baxendale*, L. R. 4 Q. B. 244). By sec. 1 no mail contractor, stage-coach proprietor, or other common carrier by land for hire, is liable for loss, including robbery by a stranger (*De Rothschild*, 7 Ex. 734), or injury to articles of certain descriptions contained in any parcel or package (see *Whaite*, L. R. 9 Ex. 67), delivered either for carriage for hire, or as passengers' luggage, when the value of such articles contained in such parcel or package exceeds £10, unless when they are received the value is declared, and an increased charge, or engagement to pay such increased charge, is accepted by the carrier. By sec. 2 such increased rate of charge must be notified by a notice conspicuously affixed in every place where such parcels are received; and by sec. 3 the carrier must give a receipt for the increased charge when required, or lose the benefit of the Act. By sec. 7 a sender entitled to damages may also receive such increased charges, in addition to the value of the parcel. Sec. 8 provides that the carrier is not to be relieved from liability for the felonious acts of his servants, nor the servants for personal liability therefor (*Campbell*, 2 R. 433; *Stephens*, L. R. 18 Q. B. D. 121). By sec. 9 the actual value of any such declared parcel must be proved, and for that only is the carrier liable. The articles for which protection is given to the carrier are detailed in sec. 1 as follows:—

"Gold or silver coin, gold or silver in a manufactured or unmanufactured state, precious stones, jewellery, trinkets [which are articles solely or chiefly ornamental (*Bernstein*, 6 C. B. (N. S.) 251)], watches, clocks, or timepieces of any description, bills [which must be complete as bills (*Stoessiger*, 23 L. J. Q. B. 293)], notes of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps [*Wyld*, 8 M. & W. 443], writings, title-deeds, paintings [which includes only works of art, not coloured designs for rugs, etc. (*Wordward*, L. R. 3 Ex. D. 121); also artists' pencil sketches (*Mythn*, 28 L. J. Ex. 385)], engravings [including prints and coloured prints (*Boys*, 8 Car. & P. 361)], pictures [including the frames when framed (*Henderson*, L. R. 5 Ex. 90)], gold or silver plate or plated articles [including looking-glasses, smelling-bottles, and the like (*Owen*, 3 L. J. Ex. 76; *Bernstein*, 6 C. B. (N. S.) 251)], glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not with other materials, furs and lace" [other than machine-made lace (28 & 29 Vict. c. 94, s. 1)]. Where a packing case contains some articles within the Act, and some not, the value of the case and the articles not within the Act may be recovered in case of loss though the Act has not been complied with as regards the other articles (*Treadwin*, L. R. 3 C. P. 308). The Act protects carriers even when goods are negligently carried beyond their destination (*Morritt*, 1 Q. B. D. 302).

Carrier's Lien.—A carrier has a particular lien over every parcel of goods carried by him, for the price of the carriage but not for booking (*Lambert*,

1 Esp. Ca. 119). It is only a specific, not a general lien (*Stevenson*, 3 S. 291). Certain English cases seem to decide that a right to retain for a general balance may be established in favour of a carrier by usage, or by special agreement, though not so as to affect third parties (*Rushforth*, 6 East, 518, and 7 East, 227). But such an agreement seems inconsistent with the character of a common carrier bound to take for conveyance all goods brought to him by the public, and has been held not to be "reasonable" in the sense of the Railway and Canal Traffic Act (*Scottish Central Ry.*, 2 M. 781; *Preble* v. *Caledonian Ry.* 2 R. 346).

Carriage of Passengers' Luggage—The obligations under the contract upon a carrier of passengers are, with respect to the passengers' luggage, the same as those of a common carrier during the transit (*Great Western Ry.*, L. R. 13 App. Ca. 31; *Campbell*, 14 D. 806), but only to the full extent when the luggage has been delivered to the carrier's servants for carriage under his exclusive custody and control. Thus if a passenger chooses to have his luggage with him in the carriage in which he travels, the carrier is not liable for loss or damage to which the passenger's own negligence has contributed. A carrier is bound to receive and take charge of the usual amount of luggage allowed to a passenger (*Robinson*, 2 B. & P. 416); and if he allows the passenger to take, either on payment for the excess or not, more than the stipulated amount of luggage, he will be liable as a common carrier for the whole (*Macrow*, L. R. 6 Q. B. 612). But the luggage must be the passenger's own—thus, if the passenger be a servant carrying his master's luggage, the master not being in the conveyance, the carrier is not liable as a common carrier (*Beecher*, L. R. 5 Q. B. 241). The luggage must be personal luggage. Whatever a passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or the ultimate purpose of the journey, is considered to be personal luggage (*Macrow*, *supra*). Personal luggage does not extend to any articles carried for the purpose of hire or profit, even though such articles would otherwise fall within the term ordinary or personal luggage (*Hudston*, L. R. 4 Q. B. 366). A carrier is not liable for the loss of merchandise delivered to him by a passenger as personal luggage unless he has had an opportunity of knowing the contents of the package, and agrees to accept it as personal luggage (*Cahill*, 31 L. J. C. P. 271). A carrier of passengers has a lien upon the luggage of the passengers for his fare and the charge for luggage, but not upon the person of the passenger or the clothes he has on (*Wolf*, 2 Camp. 631). The Carriers Act, 1830, applies equally to passengers' luggage as to goods (s. 1).

Carriage of Animals.—The rules of law as to carriage of animals are the same as those respecting carriage of goods. A carrier of animals is a common carrier, and subject to all the presumptions already noted (*Dickson*, L. R. 18 Q. B. 176). But in this case there is the additional defence to liability under the edict, that the carrier is not responsible for loss or damage wholly attributable to the development of latent inherent vice in the animal itself, such as its violence or want of temper (*Blower*, L. R. 7 C. P. 655; *Ralston*, 5 R. 671; *Nugent*, L. R. 1 C. P. D. 423). Where, however, the vice is brought out by the negligence or default of the carrier, the liability attaches (*Gill*, L. R. 8 Q. B. 186). If an animal is known to be vicious, and the carrier is informed of this, he is bound to take, not only usual, but extraordinary precautions to prevent it from doing injury to the public (*Gray*, 18 R. 76). The carriage of animals is now almost exclusively conducted by railway companies, who are under

statutory provisions as to facilities, extent of liability, care of the animals, etc. For these, reference is made to the article on Railways.

Carriage of Persons.—The contract for the carriage of persons differs from that for the carriage of goods in two respects. Carriers of persons are not common carriers; they are therefore not subject to the edict, and so are not held to warrant or insure the safe conveyance of the passenger. The other distinction is one of degree, in so far as the protection of human life has required a stricter rule, both of sufficiency and vigilance.

It is the duty of a carrier of passengers to receive all persons as passengers who offer themselves in a fit and proper state to be carried, provided he has sufficient room in his conveyance, and the intending passengers are ready and willing to pay the proper and reasonable fare, and to conform to reasonable regulations as to carriage (*Lovett*, 2 Show. 127). A passenger carrier may demand and receive his fare at the time when the passenger engages his seat; and if the passenger refuses to pay it, he may fill up the place with another passenger who is ready to make the proper deposit (*Ker*, 1 Esp. 27). A passenger is entitled to accommodation according to his contract. In the absence of express stipulation, he is entitled to all reasonable and usual accommodation. In the case of stage coaches, each passenger is entitled to 16 inches of seat (5 & 6 Vict. c. 79, s. 13). The carrier is bound to convey the passenger from the usual place of taking up to the usual place of setting down, and he cannot at any intermediate place refuse to proceed, the undertaking to carry to the journey's end being absolute (*Dudley*, 1 Camp. 167). He impliedly undertakes to carry the passenger within reasonable time and with reasonable speed (*Hawcroft*, 21 L. J. Q. B. 179). In the event of the carrier's failure to convey the passenger to his destination, the passenger is entitled to the expense of getting there by other means, or compensation for walking, if there be no other means, for the direct object contemplated in the contract is that he should reach his destination; but he is not entitled to compensation for an accidental injury or illness occasioned to him in the course of reaching his destination by such means, for such consequences are neither the proximate consequence of the breach of contract nor within the contemplation of the parties at the time of contracting (*Hobbs*, L. R. 10 Q. B. 111).

A passenger carrier not being an insurer, is not responsible for accidents where all reasonable skill and diligence have been employed. He binds himself to carry safely those whom he takes into his coach or vehicle as far as human care and foresight can go, and is responsible for any, even the slightest, neglect (*Aston*, 2 Esp. 533; *Christie*, 2 Camp. 79).

By the Stage Carriers Act, 1832 (2 & 3 Will. IV. c. 120), as altered and amended by 3 & 4 Will. IV. c. 48; 5 & 6 Vict. c. 79; 32 & 33 Vict. c. 14, ss. 19–23; and 47 & 48 Vict. c. 25, s. 4, regulations are laid down as to stage carriages. These are defined to be carriages, drawn or impelled by animal power, used for conveying passengers for hire to or from any place in Great Britain at a rate greater than three miles an hour, where each passenger pays a separate and distinct fare. Proprietors of stage carriages were required to take out a special licence, but now they take out the ordinary carriage licence. They must have their name and the number of passengers which the carriage is constructed to carry legibly printed on the vehicle: and certain provisions are made for the safety of passengers. By sec. 37 the taking of outside passengers and luggage is confined to coaches of a certain size, and by sec. 43 the height to which the luggage may be packed is also limited. Provision is also made for measuring the carriage

and the luggage and counting the passengers during the journey by sec. 45; and by sec. 15 of 5 & 6 Vict. c. 79, a penalty is imposed for carrying a greater number of passengers than that for which the carriage is constructed. By sec. 17 of the latter Act provision is made for the number of outside passengers, and such passengers may not sit on luggage (3 & 4 Will. IV. c. 48, s. 4). By sec. 47 of the Stage Carriers Act, 1832, penalties are imposed upon a driver who quits the box before a fit and proper person has the reins or stands at the horses' heads, or who permits any person to drive, or quits the box without reason, and upon a guard who discharges firearms unnecessarily, and upon either a driver or a guard who neglects to take due care of luggage, or asks more than the proper fare or charge for luggage, or, by sec. 48, through intoxication or negligence, or by wanton or furious driving, or by or through any other misconduct, who endangers the safety of any passenger or other person; and by sec. 49 the owner is liable for these penalties, where the driver or guard cannot be found.

The duty on a carrier to provide a safe vehicle, thoroughly land-worthy so far as the eye can discover, has already been noted in the case of carriage of goods. In the case of passengers, this responsibility has been raised to a much higher degree. Any defect, however small, will subject the carrier, and the burden is on him to show that there was none that he could be reasonably expected to discover. In the event of a breakdown, that in itself is held *primâ facie* evidence of negligence, which the carrier is bound to disprove (*Lyon*, 15 S. 1188; *Anderson*, 2 Murray, 261).

This duty extends to all the accessaries of the carriage. He must provide sufficient harness and steady horses (*Crofts*, 3 Bing. 321; *Simson*, L. R. 8 C. P. 390), and a driver with competent skill and fully acquainted with the road he undertakes to drive (*Crofts, supra*). Should the driver be at fault in any respect,—if he is drunk (*Gunn*, 2 Murray, 194), if he overloads the carriage or drives furiously, or drives with reins so loose that he cannot readily command his horses, or neglects the rules of the road,—not only will the driver be liable under the Stage Carriers Act, but the carrier will be liable for any injuries thereby occasioned to the passenger (*Aston*, 2 Esp. 535). The rules of the road which a driver must follow are that in *meeting* another vehicle, or horse, etc., he must keep to the left; in *overtaking*, he must pass on the right; in *crossing*, he must keep to the left and pass behind any other carriage. But these rules do not apply invariably (*Wayde*, 2 Dow & R. 255), nor in roads where there are tramway cars (*Ramsay*, 9 R. 140; *Jardine*, 14 R. 839).

A passenger who is injured by a collision is not prevented from recovering damages from the owner of the other vehicle which caused the collision by reason of the contributary fault of the driver of the vehicle in which he is travelling (*Adams*, 3 R. 215).

[See Stair, i. 9. 5; More, *Notes*, lvii.; Ersk. iii. 1. 29; Bell, *Com.* i. 490, *Prin.* ss. 157. 235; and treatises on carriers by Angell, Browne, Ivatt, and Macnamara.]

Cartel.—Writers on international law, as a rule, employ the term cartel to denote only those agreements entered into between States during, or in contemplation of, hostilities, which have for their object the ransom or exchange of prisoners of war. But there is some authority for using the term in a more extended sense, as the name for any convention made in anticipation of war or during its existence, regarding the mode in which such intercourse between the belligerent States as may be permitted shall

be carried on, and dealing with such matters as the reception of bearers of flags of truce, postal and telegraphic communication, as well as the release of prisoners (Hall, *International Law*, 570; *The Imperial Dictionary of the English Language*; Latham, *English Dictionary*). Of such agreements, however, the last-named is the most frequent and important. Cartels providing for the exchange of prisoners have now superseded those providing for ransom, the latest instance of the latter being the cartel negotiated between the British and French, 1780. The arrangements stipulated for in connection with the exchange of prisoners are carried into effect by commissaires, who are appointed by each belligerent and allowed to reside in the country of the enemy.—[Wheaton, *Elements of International Law*, Boyd's ed., 464; Halleck, *International Law*, Baker's ed., ii. 326; Phillimore, *International Law*, iii. 181].

Cartel Ship.—A cartel ship is a vessel employed by a belligerent State to carry home exchanged prisoners, which sails under the protection of a special safe-conduct, granted usually by the other belligerent's commissary of prisoners. This protects her both when she has prisoners on board and when she is empty, whether returning after having delivered enemy-prisoners, or voyaging to fetch her own from the hostile territory. The protection, however, does not cover her during a voyage from one port to another of her own territory, though for the purpose of taking on board prisoners at the latter port; and the protection is lost if she is used for other purposes than the transport of prisoners, such as taking in a cargo or carrying passengers. A cartel ship may carry no munitions of war except a single gun for firing signals.—[*The Daiffje*, 3 C. Rob. 139; *The Venus*, 4 C. Rob. 355; *La Gloire*, 5 C. Rob. 192; *The Carolina*, 6 C. Rob. 336; *Admiralty Manual of Prize Law* (Holland), 1886, pp. 11, 12; Hall, *International Law*, 571.]

Case.—I. *In Court of Session.*—By 6 Geo. IV. c. 120, s. 18, it is enacted that the Inner House shall have power, before proceeding to decide a cause, to appoint parties to prepare and print cases. This power, although seldom used, still exists. A case is an elaborate written argument of the whole cause. The case must begin with a copy of the record, as authenticated by the Lord Ordinary; and each ground of law or plea, as stated in the record, must be separately argued (6 Geo. IV. c. 120, s. 22). It would appear, however, that this stipulation is not observed. The Outer House, which at one time might exercise the same right, can no longer do so (13 & 14 Vict. c. 36, s. 14).

II. *In House of Lords.*—The statement prepared and printed by each party is called the case for the appellant or respondent. The appellant's case includes the closed record, the various interlocutors issued by the inferior Courts, a supplementary statement containing the appellant's argument, the reasons for the appeal, and, in an appendix, the proof; the respondent's case contains the argument for the respondent, and the reasons why the appeal should be dismissed. See APPEAL TO HOUSE OF LORDS.

III. *By Inferior Courts.*—By the Summary Prosecutions Appeals Act, 1875, 38 & 39 Vict. c. 62, s. 3, it is provided that on an inferior judge hearing and determining a cause, either party, if dissatisfied with the judge's decision as erroneous in point of law, may appeal thereagainst, by applying to the inferior judge to state a case; the case sets forth the facts and the grounds

of judgment for the opinion of a superior Court; it will be heard by the High Court of Justiciary if the case be criminal, or by the Court of Session if civil. The case should be, as nearly as may be, in the form of Schedule A. annexed to the Act. (See APPEAL TO HIGH COURT OF JUSTICIARY.) By the Valuation of Lands Act, 20 & 21 Vict. c. 58, s. 2; 30 & 31 Vict. c. 80, s. 8, and 42 & 43 Vict. c. 42 ss. 7–9, it is provided that either the assessor or the party assessed, may desire the commissioners or magistrates to state a case to the Lands Valuation Court, consisting of two judges of the Court of Session. (See REGISTRATION APPEAL COURT.) By the Reform Act of 1868 (31 & 32 Vict. c. 48, s. 22), if any person whose name shall have been struck off the roll by the Sheriff, or who shall claim or object before the Sheriff, considers the decision of the Sheriff to be erroneous in point of law, he may require the Sheriff to state a case, including the facts, the point of law in controversy, and the Sheriff's decision. (See ELECTION REGISTRATION APPEAL.) By the Income Tax Act, 1842, 5 & 6 Vict. c. 35, s. 100, either the person assessed or the surveyor, if dissatisfied on points of law, may require the Commissioners of Inland Revenue to state a case for the opinion of the Court of Exchequer in Scotland (*Cal. Ry. Co.*, 1888, 8 R. 89). Similar procedure is competent under the Excise Act, 1827, 7 & 8 Geo. IV. c. 53, s. 84 (see *Sumner*, 1878, 5 R. 863).

IV. *By any Court in Her Majesty's dominions.*—By 22 & 23 Vict. c. 63, s. 1, any Court in any part of Her Majesty's dominions may remit a case for the opinion in law of one of the supreme Courts in any other part thereof. Such case must contain an order by the judge remitting the case (*Guthrie*, 1880, 7 R. 1141). By 24 & 25 Vict. c. 11, s. 1, any of the superior Courts within Her Majesty's dominions may remit a case to a Court of any foreign State, with which Her Majesty may have made a convention for that purpose, for ascertainment of the law of that State.

Casual Homicide.—Homicide is either criminal or non-criminal. Criminal homicide includes murder and culpable homicide; non-criminal homicide includes justifiable and casual homicide. As the two latter are non-criminal, they are non-punishable. Justifiable homicide is intentional killing; casual homicide is non-intentional or accidental. Homicide is casual when it results from pure misadventure, when there was no intention to kill or inflict bodily harm, and when the killer was, at the time of the death, lawfully employed, and exercising due care to avoid damage to his neighbour. Not only must intention to kill be absent, but there must be absence of all criminal intent whatsoever. If there is a purpose to injure, though not to kill, there is *culpa*, and the killing cannot be said to be casual. If even a lawful act be rashly or recklessly performed, and death ensue, there is a certain amount of blame, and the homicide is not purely accidental. The Act 1661, c. 22, which deals with the several degrees of *casual* homicide, and imposes a punishment of fine and imprisonment for these offences, does not employ the term "casual" in the sense of accidental, but rather in the sense of sudden or unforeseen. Casual homicide, in the meaning of this Statute, is homicide *in rixa* or in *chaude melle*, and this form of homicide is declared by the Act to be punishable merely by an arbitrary sentence.—[Hume, i. 191, 242; Alison, i. 1, 144; Ersk. iv. 4. 41, note; Anderson, *Crim. Law*, 68; *A. B.*, 1887, 1 Wh. 532]. See HOMICIDE.

Casualties of Superiority.—See SUPERIORITY.

Casus amissionis, in a proving of the tenor, signifies "not only that the writing has been actually destroyed or lost, but that its destruction or loss took place in such a manner as implied no extinction of the right of which it was the evident" (*Winchester*, 1863, 1 M. 685). It "requires to be supported by much stronger evidence in some cases than in others. For example, if the writing be a disposition of land, of which the tenor is satisfactorily established, and which was followed by infeftment and long and uninterrupted possession, and the instrument of sasine on which is produced, a comparatively slight proof of the *casus amissionis* may be sufficient. But if it be such a writing as is usually cancelled or destroyed when it has served its purpose,—as, for example, a bill of exchange or promissory note, or a personal bond,—and if it has been destroyed, or has been found in the hands or in the repositories of the granter actually cancelled, the presumption is that the right of which it had originally been the evident no longer subsists; and very clear evidence is requisite to overcome the presumption. The same is the case when the right, of which the cancelled or destroyed writing, if it were effectual, would be the evident, is a revocable one; because such cancellation or destruction is itself an effectual mode of executing a power of revocation; and when such a writing has actually been destroyed, or has been found cancelled in the hands, or in the repositories of the granter after his death, the presumption is that such destruction or cancellation took place in the exercise of his power of revocation, and that presumption can be obviated only by very clear evidence to the contrary. In order, therefore, to judge of the sufficiency of the evidence of the *casus amissionis* of a writing in an action of proving the tenor, the nature of the writing must be carefully attended to" (*ib.*). In the case of a lost deed, not only the *casus amissionis*, but the nature of the efforts made to recover it, must be averred (*M'Clelland*, 1855, 17 D. 512; 1856, 18 D. 645; *Russell*, 1862, 24 D. 1141). The rule that a special *casus amissionis* must be shown in regard to deeds, which are usually discharged by redelivery, is applicable in the case of bills (*Campbell*, 1780, M. 15828; *Carson*, 14 May 1811, F. C.; *Macfarlane*, 1826, 4 S. 509), and personal bonds (*Hammermen of Glasgow*, 1628, M. 2247; *Begbie*, 1822, 1 S. 391; *A.* v. *B.*, 1682, M. 15802. As to what has been held to be sufficient in such cases, see *Southesk*, 1682, M. 15801; *M'Dowal*, 1713, 5 Bro. Supp. 98; *Lauderdale*, 1770, 2 Pat. App. 234; with which cf. *Richmond*, 1869, 7 M. 956; *Argyle*, 1873, 11 M. 611; and see *Miller*, 1832, 10 S. 362; *Smith*, 1882, 9 R. 866). But the rule does not apply where there is evidence or strong probability that the deed was not cancelled or discharged (*Forbes' Tr.*, 1827, 5 S. 497; *Mackenzie*, 1835, 14 S. 144). In the case of revocable writings, it is essential to prove a *casus amissionis* incompatible with intentional cancellation by the maker (*Dow*, 1848, 10 D. 1465; *Winchester*, *ut supra*, with *Laing*, 1838, 1 D. 59; cf. *Wotherspoon*, 1895, 32 S. L. R. 324); and accordingly, the unsupported testimony of a person interested in setting up a mutual will to which she was a party, to the effect that she had, in a fit of passion, cancelled the signatures, outwith the knowledge of the other party, was held insufficient (*Winchester*, *ut supra*; cf. *Lillies*, 1832, 11 S. 160; *Boyter*, 1832, 5 Deas & And. 215; 1833, 6 W. & S. 394; *Falconer*, 1849, 11 D. 1338; *Bonthrone*, 1883, 10 R. 779,—a case of cancellation by an agent authorised thereto. As to this point, see Dickson, s. 894 *et seq.*, s. 946 *et seq.*; CANCELLATION; DELIVERY OF DEEDS). In the case of public documents in the hands of public officials, a more general *casus amissionis* is sufficient (*Dalhousie*, 1511, 1 Connell on *Teinds*, 300; see also the cases of *Richmond*, *Argyle*, *Southesk*, *M'Dowal*, and *Lauderdale*, *ut supra*); and the

same principle applies to "deeds which are intended to remain constantly with the grantee, or which require contrary deeds of renunciation to extinguish them, as dispositions, seisins, wadsets, etc., or where the debtor who makes payment does not commonly choose to rely for their extinction on the bare cancelling of them, as assignations, etc. . . . insomuch that most lawyers are of opinion that it is sufficient to libel that the deed was lost anyhow, even *casu fortuito*" (Ersk. iv. 1. 54; see Stair, iv. 32. 4; and *Smith*, 1882, 9 R. 866, following *Donald*, 1787, M. 15831; 1788, 3 Pat. App. 105). But even in cases of such writings a special *casus amissionis* will not be dispensed with when it is probable that the granter discharged or cancelled the document or altered it by a later deed (*Houston*, 1711, Rob. App. 561; *Annandale*, 1733, 1 Pat. App. 108), *e.g.* where the instrument is produced, mutilated in a suspicious manner, to satisfy production in a reduction-improbation on the ground of forgery (*Graham*, 1847, 10 D. 45; cf. *Paterson*, 1837, 16 S. 225, and *Nasmyth*, 1821, 1 Sh. App. 65). Proof of a special *casus amissionis* has been held necessary in the case of an apprentice's indenture (*Scotland*, 1801, M. App. *sub voce* Tenor, No. 1). As to the sufficiency, as a *casus amissionis*, of the proof of a change of chambers by a law agent, see *Walker*, 1852, 14 D. 362; *M'Kean*, 1857, 19 D. 448.

[See Stair, iv. 32. 3, 4, 5; Ersk. iv. i. 54; Dickson, *Evidence*, s. 1337 *et seq.*; Tait on *Evidence*, 204; More's *Notes*, 386; 2 Mackay, 322; Mackay, *Manual* 514]. See Adminicles; Proving of the Tenor.

Catholic and Secondary Creditors.—Where a party has granted to one creditor a right in security over two or more subjects, and to another creditor a postponed right over one of these subjects, these rights are known as catholic and secondary securities, and the holders thereof as catholic and secondary creditors. The rights and obligations of parties in this position may be dealt with under two heads: (1) Where there is only one secondary security; (2) where there are two or more secondary securities.

Where there is only one Secondary Security.—When two estates are burdened by a prior bond covering both, and a postponed bond covering one of them, the prior or catholic creditor is bound to have regard to the interest of the postponed or secondary creditor, and to exercise his rights so as to leave the largest possible margin for the postponed security. This obligation does not prevent him, while the debtor remains solvent, from freeing one subject of his security, even if the result of such release is that his whole debt rests upon the estate over which the secondary bond extends (*Morton (Liddell's Curator)*, 1871, 10 Macp. 292). But it controls him in the exercise of his remedies for the recovery of his debt. He is under the obligation to exercise his rights in the way least prejudicial to the interests of the secondary creditor. As a rule, therefore, he is bound to take payment out of the estate over which the secondary bond does not extend, and to rank on the other estate only for the balance of his debt, so far as it may still remain unpaid (Bell, *Com.* ii. 417; *Littlejohn*, 1855, 18 D. 207; *Nicol's Tr.*, 1889, 16 R. 416). He has, however, the alternative of realising the estate over which the secondary security extends, and granting to the secondary creditor an assignation of his prior right over the other estate (*Gibbie*, 1834, 12 S. 498; *Littlejohn*, *cit.*, per Ld. President, at 213). The sequestration of the debtor does not affect the situation, as the interest of the trustee in the sequestration is not equivalent to a competing secondary right (*Littlejohn*, *cit.*).

When two or more Secondary Securities.—If both the estates over which

the catholic security extends are burdened with secondary securities, the obligations of the catholic creditor are altered. His duty is then to draw his debt rateably from each estate, so that the burden of the catholic debt should not fall unfairly upon either of the secondary creditors (Ersk. ii. 12. 66; Bell, *Com.* ii. 417: *Menzies*, 1766, M. 3378; *Ferrier*, 1896, 33 S. L. R. 508). Or he may effect the same result by drawing his whole debt out of one estate, and assigning to the holder of the secondary bond over that estate his preferable right over the other estate to the extent of the share of the catholic debt which that estate should have borne. In estimating the rateable contribution which each estate should bear, its value is to be taken subject to deduction of any burden, preferable to the catholic debt, which may happen to affect it (*Ferrier*, 1896, 33 S. L. R. 508). The actual working of these rules may be shown by an example. If there is a catholic bond for £1000 secured over the estate of A. worth £2000, and the estate of B. worth £1000, and both estates are burdened with secondary securities, the estate of A. ought to bear £666, 13s. 4d. of the catholic debt, and the estate of B. £333, 6s. 8d. The catholic creditor may, if he chooses, draw his debt from these estates in these proportions. But it will often be more convenient for him to realise one estate only, and draw his whole debt from that. Supposing he chooses to draw his whole debt from the estate of B., and thereby to exhaust that estate, the secondary creditor on B. has no title to prevent this, but will be entitled to an assignation of the preferable security over A. to the extent of £666, 13s. 4d., and will therefore, to that extent, become a preferable creditor over A.

Analogous Cases.—These rules apply to other cases besides that of secondary bonds, and are applicable wherever there are secondary interests in the different estates over which the catholic security extends. Thus if one estate is burdened with a postponed bond, and the other estate is sold to a third party, the burden of the catholic debt must be apportioned rateably. On the same principle, if two estates burdened by a security pass to a different series of heirs, the burden must be borne rateably (*MacKenzie*, 1847, 9 D. 836; *Ferrier*, 1896, 33 S. L. R. 508). And if one creditor has attached the whole estate of his debtor by diligence, and another creditor has attached a part, the holder of the universal diligence must draw his debt in the way least prejudicial to the holder of the more limited right (*Butler*, 1790; Bell, *Oct. Cas.* 154; cf. *Nicol's Tr.*, 1889, 16 R. 416). But the rules as to catholic and secondary securities do not apply where one of the estates over which the catholic security extends belongs to a cautioner for the debt. Thus if A. has a security over two estates, X. and Y., and X. is burdened by a second bond while Y. belongs to a cautioner, the second bondholder on X. cannot insist on the catholic debt being apportioned rateably, because the cautioner is only subsidiarly liable, and, if called upon to pay, is entitled to an assignation of the securities held by the creditor (*Grant*, 1779, M. 1384; *Stewart*, 11 Jan. 1814, F. C.; cf. *Sligo*, 1840, 2 D. 1478).

Rules do not apply where Catholic Creditor has an opposing Interest.—A catholic creditor is not bound by the rules above explained if they conflict with any legitimate interest of his own. Thus if, besides the catholic debt, he has a postponed debt over one of the estates, he is entitled to satisfy his catholic debt so as to free the estate over which his second bond extends, even if the other estate is burdened by a postponed bond in favour of another party (Ersk. ii. 12. 66; *Pitcairn*, 1710, M. 3371; *Preston*, 1715, M. 3376). And in one case it has been held that if there existed a catholic bond over two estates, and secondary bonds over each estate, the catholic

creditor was entitled to acquire one of the secondary bonds, and thereafter to realise his catholic debt so as to free the estate over which the bond he had acquired extended, even although the result might be that the other secondary creditor was entirely deprived of his security (*Scotland*, 1696, M. 3367; doubted by Bell, *Com.* ii. 418).—[See Bell, *Com.*, M'L. ed., ii. 417; Goudy, *Bankruptcy*, 2nd ed., p. 536.]

Cattle (Injuries by, and to).—See Animals; Winter Herding Act.

Cattle-stealing.—Hume points out (i. 87) that, in his time, a *furtum grave*, or aggravated theft, was punished capitally, and that this extreme penalty might follow even one act of simple theft, if, taken with all its qualities, it amounted to a *furtum grave*. The nature of the article stolen had always a bearing on the quality of the theft, and the stealing of domesticated animals was invariably regarded as a peculiarly heinous species of theft. Alison lays it down (i. 309) that the theft of a single sheep is not capital, but that the theft of more than one sheep, or of a single horse or ox, is punishable with death; and he cites authorities in support of these statements. At the present day the distinction between *furtum grave* and simple theft has disappeared, and theft is no longer punished capitally. There is no doubt, however, that theft of horses, cattle, and sheep is still regarded as a crime of a grave nature, to be visited with a severe penalty (Macdonald, 50). See Theft.

Causa proxima, non remota spectatur — The immediate, not the remote cause, is to be regarded.—The maxim is applicable in both contract and delict, civil and criminal. In the former it is frequently invoked in cases of marine insurance, and in the latter in actions of damages for injury, personal or patrimonial, and in criminal charges.—[Trayner, *Latin Maxims*, 72; Glegg, 33–8]. See Marine Insurance; Damages.

Cautio.—This word, in Roman law, has a variety of meanings. The most frequent and prominent use of it is to denote the giving of security for the payment of some debt or the performance of some legal obligation. Any right, indeed, which rendered the creditor *cautior et securior* was, in the eye of the law, of the nature of a right in security (*cautionalis*) (*Dig.* 46. 5. 1. 4). Though sometimes the word is used to denote a mere personal obligation on the part of a debtor (*nuda cautio—vide Dig.* 5. 1. 2. 6; Cod. 6. 38. 3), yet, as a general rule, it is employed as meaning a right in security in the proper legal sense of the term (*cautio idonea*), *i.e.* to denote that the creditor holding the security has at his disposal some means of realising payment or exacting performance of the obligation due to him, distinct from, and in addition to, the means which are at the disposal of the debtor's general creditors. The *cautio*, or the additional means thereby put at the creditor's disposal for realising payment of his debt, might either be a *jus in personam* against certain persons other than the debtor, as in *fidejussio* or cautionry; or it might take the form of a *jus in re*, a real right in some specific property belonging to the debtor, as in pledge or *hypotheca*.

In Roman law, *cautiones*, in the form of obligations fortified by the subsidiary liability of cautioners (*satisdatio*), were extensively employed for the protection of legal rights which otherwise might have been imperilled. Thus, in judicial procedure, security was frequently required from the defender that the judgment, if it went against him, would be satisfied (*judicatum solvi*) (Gaius, iv. 91. 102); or that the property, the title to which was in dispute, would be delivered up, if found to belong to the pursuer (*stipulatio pro præde litis et vindiciarum*, Gaius, iv. 91–94). Other common instances of judicial cautionry were *judicio sisti*, that the defender would put in an appearance; *ratam rem dominum habiturum*, the security given by the pursuer's procurator that his principal would satisfy his acts (Gaius, iv. 98), (cf. CAUTION, JUDICIAL).

Again, in the discharge of their ordinary administrative functions, the prætors and ædiles frequently had occasion to require persons to give *cautio* (*Inst.* iii. 18. 2). For example, where anyone apprehended damage to his house or land from the defective condition of a neighbouring house or land, the prætor, at the instance of the owner of the threatened tenement, would compel the owner of the latter tenement to enter into the *cautio damni infecti*, *i.e.* to give security that, if any such damage as was apprehended actually occurred, he would give compensation (*Dig.* 39. 2. 7. pr.) (see DAMNI INFECTI, CAUTIO). Again, where a legacy was bequeathed under a condition, or *ex die*, or where it was disputed, the legatee was entitled to demand that *cautio* be given for its future payment, if it actually became due (*cautio legatorum*) (*Dig.* 36. 3. 1. 2; 36. 4. 5 pr.). So the ædiles, through their charge of the markets, streets, public buildings, etc., had frequent occasion to provide for the performance of duties, by compelling persons to give *cautio* or security for their performance (cf. the *stipulatio dupli*, the undertaking by a vendor that he would indemnify the buyer in case of eviction, which was originally imposed by the ædiles as a market regulation, *Dig.* 21. 2. 60). Other common instances of *cautiones* extensively used were the *cautio rem pupilli salvam fore*, the security given by tutors and curators—except in certain special cases mentioned in Just., *Inst.* i. 24—that the property entrusted to them should not be squandered, misappropriated, or wrongly administered (Gaius, i. 199; Just. *Inst.* i. 24; iii. 18. 4); the *cautio de dolo*, required, for example, from *bonâ fide* possessors who were sued by the true owner, for the purpose of securing the true owner against loss arising from possible misdealing with the property before it came into his hands (*Dig.* 6. 1. 18; 6. 1. 45).

Again, it was an indispensable preliminary in usufruct and *usus* that the person having the usufruct or right of *usus* should give security by means of cautioners (*fidejussores*). The purposes of the security so given, the well-known *cautio usufructuaria* or *cautio usuaria* (*Dig.* 7. 9. 7; 7. 9. 9. 1; Cod. 3. 33. 4), were—(1) that the usufructuary or usuary would deal fairly with the property (*boni viri arbitratu*) (*Dig.* 7. 9. 1. 3); and (2) that he would return it to the owner when his interest terminated (*Dig.* 7. 9. 1 pr.). In the later law, the giving of security to these effects was superfluous, since the obligations, previously expressly secured by sureties, were imposed upon all usufructuaries at common law (*Dig.* 7. 9. 1. 5). Analogous to this was the *cautio* given in the case of quasi-usufruct (Just. *Inst.* ii. 4. 2).

The only other instance of *cautio* that need be mentioned here is the *cautio Muciana*, which applied where an inheritance was left to an heir, or a legacy to a legatee, under a condition *non faciendi aliquid*. The heir or legatee in such a case was allowed to take the inheritance or legacy on giving security to the person entitled to the inheritance or the legacy on the failure of the condition that he would restore the subject of bequest, with all the profit

derived from it (*Dig.* 31. 76. 7), if he did that which the condition forbade him to do (*Dig.* 35. 1. 7 pr., 35. 1. 79. 2).

After writing became common, the term *cautio* was frequently used to denote the written instrument by which the security was attested. Accordingly, in the writings of the late Empire, the word is nearly equivalent to "acknowledgment," meaning either a memorandum evidencing an existing debt, especially an acknowledgment of a loan of money (*Dig.* 12. 1. 40 pr.; 44. 7. 29; Cod. 5. 14. 11), or an acknowledgment of payment or performance, in other words, a receipt (*Dig.* 22. 3. 15; Cod. 9. 1. 2).

Cautionary Obligations.—*Definition.*—A cautionary obligation is an accessory undertaking to answer for the payment of some debt or the performance of some duty, in case of the failure of another person, who is himself, in the first instance, liable for such payment or performance (cf. Bell, *Com.*, M'L. ed., i. 364). The person who undertakes the accessory obligation is the cautioner, surety, or guarantor; the person to whom the obligation is undertaken is the creditor; and the person whose liability is the foundation of the contract is the principal debtor. Cautionry, in Scotland, corresponds to suretyship in England; and the principles which regulate the contract are practically identical in both countries (see per L. Eldon in *Grant*, 1818, 6 Dow's App. 239, at 252). The difference between a cautionary obligation and a guarantee is a difference rather in name than in substance, a guarantee being distinguished from a formal cautionary obligation chiefly by the looser epistolary form of the writing (Bell, *Com.*, M'L. ed., i. 388). The main principles applicable to this contract, along with many of the terms used in connection therewith, are taken directly from the Roman law on the subject. See FIDEJUSSOR.

Strictly accessory Nature of the Contract.—The fundamental characteristic of the contract is that the obligation, on the part of the cautioner or guarantor, is strictly accessory in its nature. A cautionary obligation is granted by way of security for the fulfilment of some primary obligation on the part of a principal debtor, who, as such, remains liable (*Dig.* 46. 1; Ersk. *Inst.* iii. 3. 64; Bell, *Prin.* s. 245). In other words, the obligation of a cautioner is not an independent obligation, but is essentially conditional in its nature, being properly only exigible on the failure of the principal debtor to pay at the maturity of his obligation.

Consequently there must exist a Principal Debt to which the Cautioner's Obligation accedes.—From the essentially accessory nature of cautionry, it follows that the existence of a lawful principal obligation by a principal debtor to a creditor is a necessary requisite in this species of contract. "There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time; but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed" (per L. Selborne in *Lakeman*, 1874, L. R. 7 H. L. 17, at 26). This principal debt is not necessarily an obligation for the payment of a money claim; it may be for the performance of an act, for the delivery of goods, or for the performance of the duties of an office. In respect of any obligation, in short, which may lawfully be laid on the principal debtor,—whether certain or indefinite in amount,—a cautioner may intervene. *Omni obligationi fidejussor accedere potest* (*Dig.* 46. 1. 1). Nor does it matter whether the principal obligation has been already contracted at the time the cautioner enters into his obligation,

or whether, being then only in contemplation, it be not actually constituted till after that date (*Dig.* 46. 1. 6. 2). All that is necessary is that there exist a principal obligation, and such principal obligation may be either previously, or contemporaneously, or subsequently contracted. *Fidejussor et præcedere obligationem et sequi potest* (*Inst.* iii. 21. 3). The law of Scotland on this matter has always been in conformity with the Roman law; and in England it was authoritatively laid down so early as 1787, in the leading case of *Matson* (1787, 2 T. R. 80), that no distinction is to be taken between the cases in which the liability of the principal debtor emerges before, and those in which it emerges after, the cautioner's contract.

If the Principal Obligation be Null, the Cautionary Obligation also Fails.—From the strictly accessory nature of cautionry, it also follows that, where the principal obligation turns out to be null and void, the obligation of the cautioner is equally of no effect. If, for example, the obligation of the principal debtor is void by reason of its inherent illegality, as being *contra bonos mores*; or because it has not been completed, as where the debtor has not subscribed his obligation (*Crichton*, 1612, M. 2074); or because the principal debtor, though formally bound, is in law totally incapable of contracting, as in the case of a pupil or insane person (Stair, i. 17. 11);—there can be no liability on the part of the cautioner. So where the cautionary obligation is entered into on the basis of a contemplated liability to be subsequently undertaken by a third party, the emergence of such liability on the part of the third party is a condition precedent to the arising of any liability on the part of the cautioner. In other words, if in such a case, it turns out that the third party, whose prospective liability is made the foundation of the contract, never actually himself becomes liable, then the accessory contract necessarily fails, because there is a failure of that which the parties intentionally made the foundation of their contract (see, for a full discussion of this subject, the opinions in *Mountstephen*, 1871, L. R. 7 Q. B. 196; affd. 1874, L. R. 7 H. L. 17). On the same principle, so soon as the creditor's claim against the principal debtor—though valid at first—comes to an end, as where the debt guaranteed is allowed to prescribe (*Halyburtons*, 1735, Mor. 2073), or is novated (Pothier, *Oblig.* 378), the liability of the cautioner is extinguished. In short, as there can be no guarantee of a principal obligation which never comes into existence, so there cannot continue to be a guarantee of a principal obligation which has ceased to exist (*Dig.* 50. 17. 178; *Commercial Bank of Tasmania* [1893], App. Ca. 313).

Modification of this Rule—the Principal Debt need not be Exigible at Law.—It is not, however, necessary in all cases to the validity of the accessory contract that the principal debt should be exigible against the principal debtor by process of law. For the law of Scotland, following the Roman law, regards it as a sufficient foundation for the cautioner's contract that the principal debtor should be bound by a natural obligation—bound morally though not legally (Ersk. *Inst.* iii. 3. 64; Bell, *Prin.* s. 251). In such a case the creditor has a good title to sue the cautioner, though he has no action to enforce payment from the principal debtor. Thus though no cautionary obligation can exist where the principal debt is absolutely void, yet, where the principal debt is only voidable, a party intervening to secure payment is truly a cautioner, and the accessory obligation is good though the primary obligation will not sustain an action against the principal debtor. Accordingly the contract of a minor, who has no curators, being good until set aside on the ground of actual lesion, is a good basis for a cautionary obligation. Even where a minor, who has curators, has entered into a contract without their consent, his obligation, although, in respect of

the non-consent of his curators, it is ineffectual at law, has nevertheless been held to afford a good basis for holding his cautioners liable (*Stevenson*, 1870, 10 M. 919—the case of a cautioner in an indenture of apprenticeship entered into by a minor without the consent of his father). In such a case the cautioner, who engages to make good the debt, or guarantees the performance of the duty, is presumed to know the debtor's condition (Ersk. *Inst.* iii. 3. 64). So though the personal obligation of a married woman is, in the ordinary case, invalid, and will found diligence neither against her estate nor against her person, her cautioner is bound (*Shaw*, 1623, Mor. 2074; *Buchanan*, 1828, 6 S. 986). Again, though the deed constituting the principal debt be invalid owing to some informality of execution, as by reason of being subscribed by only one witness, yet the natural obligation of the principal may be sufficient to sustain the accessory liability of a cautioner, at least if the latter knew of the informality (*Nimmo*, 1700, Mor. 2076; *Johnstoun*, 1680, Mor. 2076). The whole doctrine is concisely stated by Erskine in language which has been frequently quoted with approval by the Courts as follows:—"A cautioner can in no case be bound in a higher sense to the creditors than the proper debtor is, for there cannot be more in an accessory obligation than in the principal. Yet he may be more strictly obliged than the proper debtor, as when the cautioner gives the creditor a pledge or a real right in his lands, or when one is cautioner for a debtor who is not himself civilly or fully obliged; for a cautionary obligation may be effectually interposed to an obligation merely natural. Thus a cautioner in an obligation in which the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himself should get free by pleading the statutory nullity, or his own legal incapacity. The reason of this is obvious: *sibi imputet* who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall make good the debt" (Ersk. *Inst.* iii. 3. 64). From this passage it further appears that where a person binds himself to a creditor on behalf of a third party whom he knows not to be bound, or to be incapable of contracting, the obligation may be enforced. The obligant's knowledge of the invalidity of the primary contract or of the principal's incapacity may, if proved, ground a plea of personal bar against him. In this case, however, the obligation, though it may formally be one of cautionry, is really an independent, and not an accessory, obligation (*vide infra*). The Courts in England have gone quite as far as the Scots Courts in the direction of enforcing the promise of a person who, in the knowledge that an obligation by a third party to a creditor is invalid, deliberately undertakes to secure payment to the creditor. So far has this doctrine been carried that, as has been observed, the rule that a third party cannot be liable upon a contract of guarantee unless the principal be also liable, would appear in some cases to be true in form or words rather than in substance (Chitty on *Contracts*, 12th ed., 486). Thus where a company entered into a transaction, which by reason of a statutory illegality was void, it was held that the directors of the company, who had interposed as guarantors of rent in connection therewith, were nevertheless liable under their guarantee (*Yorkshire Railway Waggon Co.*, 1881, L. R. 19 Ch. Div. 478). Again, where a person undertook professedly as surety to answer for the payment of a debt by an infant incapable of contracting, he was held bound as being substantially the only contracting party (*Harris*, 1757, 1 Burr. 373).

Contracts to be distinguished from Cautionry.—The essential characteristics of the contract of cautionry are of much practical importance, since its several distinctive features serve, when applied as tests, to mark off other classes of contract, which, though closely resembling cautionry in many particulars and occasionally incorrectly included under that term, are nevertheless wholly distinct, and are regulated by altogether different principles.

Cautionary Obligations distinguished from Independent Obligations.—Since the accessory character of a cautionary obligation is one of its most essential features, it is clear that if a person undertakes an obligation, in the absence of any liability on the part of a third party, or regardless whether or not such a liability exists, or ever will exist, he is not a cautioner, but enters into an independent contract. As has been pointed out, it is not necessary to the constitution of a cautionary obligation that the liability on the part of the principal debtor should actually be in existence at the date of the accessory contract; but if the contract is one of cautionry, it is necessary, when one binds himself for the performance of an obligation which is to be undertaken subsequently by a third party, that, at the date of the transaction, the parties to it clearly contemplate, as the foundation of their present contract, the creation of a primary liability on the part of the third party at a future date. The mere fact that the promise was made for the benefit of a third party, or that the consideration passed to a third party, will not suffice to make the earlier contract one of suretyship, unless it be further shown that the intention of the contracting parties was that the third party should become actually primarily liable, and that this contemplated future liability on his part was the basis of the earlier contract (*Mountstephen*, 1871, 7 Q. B. 196; affd. 1874, L. R. 7 H. L. 17). So an obligation to a creditor in these terms, "I will see the above account settled," was held "not a cautionary obligation," because it appeared that the obligant did not contemplate the continued liability of the original debtor as the basis of his promise (*Morrison*, 1870, 9 M. 35; see also *Woodside*, 1848, 10 D. 604, and *Molleson's Trs.*, 1851, 13 D. 1075). It is often, indeed, difficult to determine whether there was a promise to pay whether a third person should be liable or not—in which case it is an original and independent obligation; or whether the promise was to pay only in the second instance, and in the event of the failure of a third person, who was, or was about to be, primarily liable—in which case it is a cautionary obligation. Where, for example, A. induces a tradesman to deliver goods to B. by promising to see the price paid, the nature of A.'s liability depends upon whether the tradesman as a matter of fact gave credit to A. or to B. If the credit was given entirely to A., then the goods, though delivered to B., must be considered as sold to A., who accordingly is liable as a principal; if, on the other hand, the tradesman trusted primarily to the credit of B., then the goods must be considered as sold to him, in which case A. is liable only in the second instance, and as a surety for the price (*Blackwood*, 1848, 10 D. 920; *Grant*, 1853, 15 D. 424; *Couturier*, 1852, 22 L. J. Ex. 97). In settling to which of the two credit was really given, all the circumstances of the transaction are to be taken into account (*Selkirk* (*Stevenson's Tr.*), 1896, 33 S. L. R. 503); and it is an important, though not a conclusive element in this inquiry, to determine which of them was debited with the debt in the tradesman's books (*Keate*, 1797, 1 B. & P. 158; *Storr*, 1833, 6 C. & P. 241; *Croft*, 1793, 1 Esp. 121). The law on this subject was succinctly stated *per curiam* in the leading English case, *Birkmyr* v. *Darrell* (6 Mod. 249; 1 Sm. L. C., 10th ed., 287),—a statement approved and followed by the First

Division of the Court of Session in the recent case of *Selkirk* (*Stevenson's Tr.*), 1896, 33 S. L. R. 503,—as follows:—"If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, 'If he does not pay you, I will,' this is a collateral undertaking, and void without writing by the Statute of Frauds. But if he says, 'Let him have the goods; I will be your paymaster,' or 'I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant."

Cautionry distinguished from Novation.—Again, it is an essential feature in a cautionary obligation, directly resulting from its accessory character, that the cautioner, by undertaking his obligation, does not exonerate the principal debtor, or extinguish the principal debt. In the words of Erskine, the obligation of the cautioner is "barely adjected to the debtor's obligation without extinguishing it" (Ersk. *Inst.* iii. 3. 61; compare the definition in Roman law . . . *ut principalis debitor nihilominus maneat obligatus* (*Dig.* 46. 1)). It is this feature which marks the distinction between a cautionary obligation and novation, or, more properly, delegation. Cautionry is the acceptance by the creditor of an additional debtor for, and along with, the original debtor; delegation is the acceptance by the creditor of a new debtor for, and in lieu of, the original debtor. The distinction is accurately marked in Roman law by the terms *adpromissio* and *expromissio*. An *adpromissor* was a proper cautioner; an *expromissor* was a new debtor, substituted for an old debtor (see ADPROMISSOR and EXPROMISSOR). Where, in short, the original debt is discharged or destroyed by the new agreement, the contract is one of delegation, and not one of cautionry (cf. *Jackson*, 1892, 19 R. 528). Even if the third party, whose obligation has been accepted by the creditor in room and discharge of the obligation of the original debtor, has an action of relief against the former debtor, he is not a cautioner *quoad* the creditor (Stair, i. 17. 3). Delegation, however, is not presumed; and *in dubio* the new obligation is accounted merely corroborative of the old. Cases of this sort frequently raise a difficult question of fact; but the principle of law is clear, and unless the liability of the third party, who was originally liable to the creditor, continues unimpaired, the undertaking of the new debtor is not a cautionary obligation (*Morrison*, 1870, 9 M. 35). See NOVATION.

Cautionry distinguished from Contracts of Indemnity.—It is essential in cautionry that the cautioner's undertaking be granted to, or in favour of, the creditor in the primary obligation, or at least to, or in favour of, his agent for his benefit (Pothier on *Obligations*, 394). This feature distinguishes cautionary obligations and guarantees from contracts of indemnity, in which one promises to keep another harmless from the results of a transaction into which he enters at the instance of the promiser. In contracts of this latter sort the promise is made, not to the creditor, but to the debtor in the principal obligation, the purpose being to induce him to undertake the liability by assuring him of indemnity against loss. Thus where the defender, in a so-called letter of guarantee, undertook that if the pursuer got certain shares subscribed for, he, the defender, would make good to him any loss which he might incur by so doing, the Court held that, since this was not the case of a person stepping in to corroborate the obligation of a principal debtor, it did not partake in any degree of the nature of a cautionary obligation, but was an independent obligation to relieve the other contracting party of any loss incurred by him (*Milne*, 1869, 8 M. 250). Exactly the same distinction has been given effect to in England, it being held that the 4th sec. of the Statute of Frauds applies only to promises

made to the person to whom another is answerable. The distinction was first acted on in England in *Thomas* (1828, 8 B. & C. 728), and it has subsequently been approved in many important cases (*e.g.* by the Court of Exchequer, in *Hargreaves*, 1844, 13 M. & W. 561; by the Court of Common Pleas, in *Reader*, 1862, 13 C. B. (N. S.) 344; by Malins, V. C., in *Wildes*, 1874, 19 L. R. Eq. 198. Important applications of the principle will be found in *re Hoyle* [1893], 1 Ch. 84, and in *Guild & Co.* [1894], 2 Q. B. 885, in which latter case the whole question of the distinction between contracts of suretyship or guarantee and contracts of indemnity was fully considered by the Court of Appeal, and all the previous cases on the subject were reviewed). Again, in the words of L. Stair, "caution is a promise or contract of any, not for himself, but for another" (Stair, i. 17. 3). Accordingly an undertaking to answer for one's own debt, though the promise be to pay it to a bank instead of to the original creditor, is not a guarantee, but is merely a consent to the substitution of a new debtor (*Hodgson*, 1825, 5 D. & R. 735; cf. Pothier on *Obligations*, 394).

Cautionry distinguished from Obligations undertaken primarily in the Obligant's own Interests.—Obligations are frequently undertaken in which the main object and effect of the intervening party is not to secure payment or performance by a third party, but to relieve himself or his property from some pre-existing liability. An undertaking of this kind, even though it takes the form of a liability to answer for the debt of another, is not an accessory contract of guarantee, but an independent contract on the obligant's own behoof. Thus where a person signed a bond of cash credit to be operated on by his son's firm, of which he was not a partner, it was held not enough to give him the rights of a cautioner that *ex facie* of the bond he appeared as only a cautioner, on its being shown that the drafts upon the cash credit were applied for his behoof partly in payment of an old bond, to which the *ex facie* cautioner was a party, and partly in payment of a private debt due to him by one of the partners of the firm (*Erskine*, 1842, 4 D. 1478, see per L. Fullerton; see also *Union Bank*, 1870, 7 S. L. R. 596; affd. 1873, 10 S. L. R. 319). The same principle is given effect to in England in discriminating contracts of suretyship or guarantee from obligations which, though involving, as an ulterior consequence, a liability to answer for the debt of another, are nevertheless independent and not accessory obligations (*Boynton*, 1888, L. R. 22 Q. B. D. 74; *Macrory*, 1850, 5 Ex. 907; *Fitzgerald*, 1859, 29 L. J. C. P. 113; *Sutton & Co.* [1894], 1 Q. B. 285, see per Esher, M. R.). These authorities, both Scots and English, fully bear out the statement of L. M'Laren in his Note on the Mercantile Law Amendment Act (Bell, *Com.*, M'L. ed., i. 407), that where there exists a liability on the part of the promiser in connection with the debt, for which he becomes responsible, distinct from the liability of the third party, for whom he intervenes, or, in other words, where the promiser's liability is founded on a consideration proper to himself and distinct from the cause of demand which the creditor has against the original debtor, his obligation is not cautionry, and is outside the scope of the 6th sec. of the Mercantile Law Amendment Act, 1856.

Cautionry distinguished from the Contract of a del credere *Agent.*—The position of a *del credere* agent is merely a particular instance of the more general class of cases dealt with in the last paragraph. Such an agent, in consideration of receiving a larger commission, undertakes to be responsible to his principal in case of default in payment by the person to whom he sells goods (*Mackenzie*, 1796, 3 Pat. App. 525; Bell, *Com.* i. 395). In many respects the position of such an agent closely resembles that of a cautioner

or guarantor. Nevertheless, since the main purpose of the agent's contract is not the guaranteeing of the debts of any particular third parties, but the selling of goods with special care, his contract is an independent and not an accessory one. In other words, the fact that the immediate object of the agreement is to regulate the terms of the agent's employment, and that any liability to answer for the debts of others, which may subsequently emerge, is only an ulterior consequence of the terms in which the contract is framed, excludes such agreements from the category of cautionary obligations (*Couturier*, 1852, 8 Ex. 40; see per Baron Parke, at p. 55; reversed on another point, 1856, 5 H. L. Ca. 673; see also *Fleet*, 1871, L. R. 7 Q. B. 126, at 132–3; *Sutton & Co.* [1894], 1 Q. B. 285; see note by L. M'Laren, Bell, *Com.* i. 407). See Del Credere Agent.

Cautionry distinguished from a Mandate to Lend Money or Give Credit.—A person who gives a mandate to one party to lend money, or give credit, to a third party is regarded as a cautioner by the institutional writers (Stair, i. 17. 3; Ersk. *Inst.* iii. 3. 61). Other authorities, however, hold that, since there intervenes between the so-called cautioner and the creditor a regular contract of mandate, the mandant is bound *ex causâ mandati* in an independent, and not in an accessory contract (Pothier on *Obligations*, s. 446; L. M'Laren's Note on Mercantile Law Amendment Act, Bell, *Com.* i. 408). The question seems largely to depend upon the circumstances of the particular case. On the one hand, where the mandate is to lend money, or give credit, to a third party, exclusively for behoof of the third party, who, on receipt of the money or goods, becomes himself primarily liable to the creditor for payment, the mandant being secondarily liable, the position is indistinguishable from that of a cautioner who binds himself for the performance of an obligation to be subsequently undertaken by a third party. On the other hand, where the mandate is given for behoof of the mandant himself, the contract strictly belongs to the category of mandate. (Cf., as to the distinction in the mode of proof in the two cases, Dickson on *Evidence*, s. 572; Tait on *Evidence*, ss. 300, 302; see also *Paisley*, F. C. 13 Jan. 1779, and the criticism on the decision in *Arbuthnot*, 1765, 5 Br. Sup. 910.) See Mandate.

Cautionry distinguished from Liability incurred under a Representation.—Finally, a cautionary obligation or guarantee is to be distinguished from liability incurred under a representation as to the solvency, credit, or trustworthiness of a third party. A person, by making a representation to one man regarding the credit of another, may incur liability upon one of two grounds: (1) If a person make a statement as to the solvency or trustworthiness of a third party, which is false in fact, and which is made in the knowledge of its falsehood, or recklessly without belief in its truth, with the intention that it be acted on by the person to whom it is made, the person who has acted on the assurance has a good action of damages against the maker of the representation for the loss sustained by his having acted on it. The principle upon which the liability is based in this case is the fraud perpetrated by the person making the representation. (2) Apart from fraud, a representation may give rise to liability through the operation of the doctrine of personal bar. In other words, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his previous position, the former is, in a question with the latter, personally barred from disproving or denying the state of facts, with the practical result that he is compelled to make good his representation. He is, in short, "bound for the truth of his information as at the time he gave

it" (per L. Jeffrey in *Johnstone*, 1845, 7 D. 1046, at 1054; see also *Park*, 1851, 13 D. 1049; *Ross*, 1820, noted in Hume's *Decisions*, 116; Bell, *Com.* i. 389). In both of the above-mentioned classes of cases the party making the representation is in the result subjected to liability for the debt of another, just as if he had entered into a cautionary obligation. It may, too, be difficult to determine whether a statement is to be construed as a representation or as a promise (*Paton*, 1896, 33 S. L. R. 533). Nevertheless, liability under representations and the liability of a cautioner are obviously founded on wholly distinct principles. On the one hand, the cautioner's liability for the debt of another is based solely upon contract: he voluntarily engages to be subsidiarily liable. In the case of a representation, on the other hand, the liability does not in any way depend on contract. It is manifest that in neither of the two above-mentioned cases of liability under a representation is there any agreement, or intention to contract. In the first case, where the representation is fraudulent, the person making the statement is clearly liable *ex delicto*, and not *ex contractu*; and similarly, in the second case, the party making the representation becomes responsible for the consequences, not at all because he is bound by way of contract or agreement, as a person undertaking a cautionary obligation is, but because he is personally barred from denying the truth of the representation, and compelled to make it good as if it were true. The whole question of liability under a representation is discussed, and the authorities fully set forth, *sub voce* REPRESENTATION.

Classification of Cautionary Obligations.—The term "cautionary" is applied more or less loosely to a variety of obligations, of which three classes may be distinguished:—

(1) *Obligations in which the Creditor secured is a Party to the Contract.*—In cautionary contracts, strictly so-called, there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor secured is a party. It is only to obligations of this class, in which the creditor secured is a direct party to the contract, that the principles of cautionry are from the first fully applicable. In such contracts, the cautioner-obligants may either be bound singly and expressly as cautioners for the principal debtor, or they may be bound along with him as co-principals and full debtors. Where the cautioners are bound simply as cautioners, they are "proper" cautioners, and are in the first instance liable to the creditor each only for his *pro rata* share, though of course, in the event of the bankruptcy or insolvency of one of their number the others must make up his share. Where the cautioners are bound along with the principal debtor, as co-principals and full debtors, or in a joint and several obligation, they are "improper" cautioners, and the creditor has instant and effectual recourse against each of them for the whole amount of the debt (Bell, *Prin.* s. 247; *Morton's Trs.*, 1892, 20 R. 72; *Wilson*, 1840, 1 Rob. Ap. 137, see per L. C. Cottenham, 148). At the same time, while the creditor can in this latter class of cases at once enforce his debt against any of the co-obligants, the fact that the cautioner-obligants are bound as co-principals in no way affects their right of total relief against the obligant, who is the real principal debtor, and, further, does not prevent the cautioner-obligants from being entitled to all the equities of cautioners in a question with the creditor, provided it is admitted or proved that the creditor was aware that certain of his obligants, though bound as principals, are truly not principals, but only cautioners (*M'Kenzie*, 1831, 5 W. & S. 504). Accordingly, if the creditor, by giving time to the principal debtor, by giving up securities, or by other actings, prejudice the

rights of the cautioner-obligants, he does so at his peril (*vide infra*). In order to this result, however, it is necessary that it be satisfactorily established, where the cautionary contract is constituted by means of a joint and several obligation on the part of the principal debtor and his cautioners, that the creditor was a party to the cautionary relation subsisting between his obligants. In many cases the real nature of the agreement is made sufficiently clear by the terms of the obligation undertaken by the obligants to the creditor, as, for example, where certain of the obligants are expressly described as cautioners: where there is a clause of relief in the bond: or where there exists a separate letter of relief, proved to have been distinctly intimated to the creditor at the time of taking the bond (*Murray of Broughton's* case, 1722, Mor. 14651; affd. by House of Lords in Robertson's *Appeals*, 465; *M'Kenzie*, 1775, Mor. 14661). Apart from these methods of proof, it is well settled that, wherever it clearly appears from the nature of the transaction as set forth in the deed that certain of the obligants, though subscribing as principals, are merely cautioners,—though this be not formally stated,—the parties in question are entitled to the rights of cautioners, not only in a question with the principal debtor, but also in a question with the creditor. The law, in short, in determining the relation of the parties and their relative rights and duties, looks to the real substance and nature of the transaction, and not merely to its form (*M'Kenzie*, 1831, 5 W. & S. 504, see per L. Chanc. 511; *Paterson*, 1847, 6 D. 987: *Fleming*, 1826, 2 W. & S. 277; *Storie*, 1830, 8 S. 853; *Drysdale*, 1839, 1 D. 409).

(2) *Obligations in which the Relation of Principal and Cautioner is constituted by an Agreement between the Obligants, to which the Creditor is not a Party.*—Not infrequently the relation of principal debtor and cautioner is constituted by agreement between the principal debtor and cautioner only, the creditor being a stranger to the agreement. In such a case, the relation of the obligants to the creditor is determined wholly by the quality of the obligation undertaken to him in the instrument constituting the debt. In other words, if, *ex facie* of the instrument, they are bound jointly and severally, the creditor's right to enforce the debt is in no way affected by the existence of the mutual agreement among the co-obligants *inter se*; and, further, so long as the creditor is ignorant of the cautionary relation subsisting among his debtors, he is untrammelled in his dealings with them by the rules applicable to the conduct of a creditor in a cautionary obligation. At the same time, the fact that the co-obligants are *correi* in relation to the creditor does not impair their respective rights *inter se*, which do not depend in any degree upon their contract with the creditor, but wholly upon the agreement, express or implied, among themselves (*Morton's Trs.*, 1892, 20 R. 72, see per L. M'Laren). Further, even where the obligants are bound to the creditor in a formal bond, it is competent to prove the mutual agreement among themselves by parole evidence with a view to settling questions of relief: and when it is proved that the relation of principal debtor and surety does exist between persons *ex facie* bound as principals, then, if any one of those who are (in fact) surety-debtors is called upon by the creditor to pay any part of the debt, he is, both in Scotland and England, entitled to full relief from the obligant, who is (in fact) principal debtor: and as between the obligants who are merely sureties, if one pays more than his share of the debt of the principal, he is entitled to claim a rateable contribution from the others (Bell, *Prin.* s. 267: *Morton's Trs.*, 1892, 20 R. 72: *Lindesey*, 1851, 13 D. 718: *Thorburn*, 1859, 1 M. 1169; see also *Ramskill*, 1885, L. R. 31 Ch. D. 100). As regards the creditor, in cases of this sort there is, as has been pointed out, no

contract of cautionry at all, so long as he continues a stranger to the principal-and-surety relation subsisting between his debtors. In other words, so long as his ignorance of this relation continues, he is subject to none of the obligations incident to the position of a creditor in a cautionary obligation. From the moment, however, that the true mutual relation of his obligants is brought to the creditor's knowledge, he forthwith becomes liable in the duties and responsibilities of a creditor in an obligation which was from the first one of cautionry, and is bound in all his subsequent actings in respect of the debt to regard and protect the rights and interests of the surety-obligants (see per L. Selborne in *Duncan, Fox, & Co.*, 1880, 6 App. Ca. 1, at 12; *Greenough*, 1860, 30 L. J. Q. B. 15; *Liquidators of Overend, Gurney, & Co.*, 1874, L. R. 7 H. L. 348).

(3) *Obligations in which, without any Express Contract of Cautionry, there is a Primary and Secondary Liability on the part of two or more Persons for one and the same Debt.*—Again, there is a class of cases in which, though there is no intention to undertake an obligation of cautionry, there nevertheless exists a primary and secondary obligation on the part of two or more persons for one and the same debt, with the result that the relations of the parties are in great measure regulated by the principles which govern cautionary contracts. The relation of the partners in a firm to the firm is an example of this, since a contract of partnership implies a guarantee by each individual partner to third parties of all engagements legally undertaken in the social name, so that the individual partners are in the position of sureties for the firm (Bell, *Prin.* s. 351; Bell, *Com.* ii. 506). The most important example, however, of such a primary and secondary liability for one debt is found in bills of exchange. The mutual relations of parties to a bill are very nearly identical in many respects with those of parties to a cautionary obligation. Thus in a bill accepted and endorsed for value, the acceptor is practically in the position of a principal debtor in a cautionary contract, while all the other parties, both the drawer and the endorsers, are, like cautioners, liable on his default for the payment of the bill to the holder—the creditor in the obligation. So, as between the drawer and endorsers, each subsequent party occupies a position closely resembling that of a cautioner to the holder of the bill for each of the prior parties to the bill. Hence many of the most valuable illustrations of the application of the principles of cautionry are found in cases dealing with bills. At the same time, of course, the rights and duties of the parties to a bill are not, in the ordinary case, in any way the result of an express contract of cautionry, but arise solely from the interpretation put by the law merchant on the signatures *ex facie* of the bill.

Constitution of the Contract of Cautionry.—It seems the better opinion that, by the common law of Scotland, the contract of cautionry or guarantee is a consensual contract, to the constitution of which writing is not necessary. Thus L. Stair lays it down that "caution is interposed any way by which consent is truly given" (Stair, i. 17. 3); and Erskine distinguishes between contracts such as cautionry and bargains where writing is essential to their constitution, as in those relating to land (Ersk. *Inst.* iv. 2. 30). Cautionry, in other words, is not a *literarum obligatio*, and before the Mercantile Law Amendment Act, 1856, merely verbal contracts were, in certain cases, valid (Bell, *Prin.* s. 18; Dickson on *Evidence*, s. 597. There is, indeed, conflicting authority on this point, *e.g. Walker*, 1785, Hailes' *Decisions*, 985; *Edmonston*, 23 June 1786, F. C.; see also the statement of Prof. Bell, *Illust.* i. 175–6, contrary

to the statement of law in his *Principles*, s. 18). By sec. 6 of the Mercantile Law Amendment Act, 1856, it is provided that cautionary obligations or guarantees "shall be in writing, and shall be subscribed by the person undertaking such guarantee or cautionary obligation . . . otherwise the same shall have no effect." The precise meaning and effect of this statutory provision has never been judicially determined. Two views have been taken of it: the first being that, under the Statute, writing is essential to the constitution of the contract; the other, that writing is still only required *in modum probationis*. *Primâ facie* the words "otherwise the same shall have no effect" seem to refer to the constitution of the contract. On the other hand, the preamble of the Act bears that it was passed for the purpose of assimilating the law of Scotland to that of England in regard to the matters dealt with in it: and it has long been settled in England that, under the corresponding English Statute, writing is required in such cases, not as a solemnity, but as evidence of the contract. To hold that sec. 6 of the Mercantile Law Amendment Act has made writing and subscription essential to the constitution of cautionary obligations would therefore be to construe the Act as establishing a difference between the laws of the two countries, instead of bringing about the assimilation which it was its main purpose to effect. Accordingly, it seems to be the better opinion that writing is, in the case of a cautionary contract, still required merely in evidence before the contract can be made the ground of legal action, and is not necessary to its constitution (see opinions in *Wallace* v. *Gibson*, 1895, 22 R. (H. L.) 56).

Capacity to contract Cautionary Obligations.—Capacity to enter on a cautionary contract is in the main regulated by the same rules as capacity to contract other personal obligations; but in cautionry, for obvious reasons, these rules are applied with greater strictness than in the generality of personal obligations.

At common law, a married woman is incapable of granting a binding cautionary obligation, even where she has a separate estate (see per L. P. Inglis in *Biggart*, 1879, 6 R. 470, at 481); and the Married Women's Property Act (44 & 45 Viet. c. 21) has not altered the law in this respect (*Jackson*, 1892, 19 R. 528).

Where a cautionary obligation has been undertaken by a minor who has no curators, or who has acted with the consent of his curators, and the minor subsequently seeks to reduce it within four years after he has reached majority, upon the ground of minority combined with lesion, a strong presumption of law arises to aid the proof of lesion from the fact that the obligation was a cautionary one (Stair, i. 6. 44; Bell, *Com.* i. 135; Fraser, *Parent & Child*, 407).

A partner of a firm has not implied authority to bind the firm by adhibiting the firm signature to a guarantee of the debt of a third party, unless it is shown that the granting of guarantees is necessary for the purpose of carrying on the business of the firm in the ordinary way, as, for example, in the case of a guarantee association (*M'Nair & Co.*, 1803, Hume, *Decisions*, 753; *Blair*, 1834, 13 S. 901; *Paterson*, 1891, 18 R. 403). Even where the matter in which the debt was incurred by the third party is closely related to the firm's business, a partner has no implied authority to bind his firm in a guarantee of the debt due by the third party (*Brethl*, 1869, 4 Ex. 623; Bell, *Com.* ii. 506; see also per L. Blackburn in *Shiell's Trs.*, 1884, 12 R. (H. L.) 14, at 23). Of course a guarantee granted by one partner is binding on the firm in all cases in which it appears that the other partners have either previously assented to the giving of the

guarantee or have subsequently ratified it (*Sandilands*, 1819, 2 B. & Ald. 673; *In re West of England Bank*, 1880, L. R. 14 Ch. Div. 317).

A company is not bound by a guarantee granted by its directors, managers, or other officials, unless their power so to bind the company clearly appears, expressly or by fair implication, in the rules, or articles, or memorandum of association (*Shiell's Trs.*, 1883, 10 R. 1198; affd. by House of Lords, 1884, 12 R. (H. L.) 14).

An agent, however wide and general be his authority in conducting the business of his principal, has no implied power to bind his principal by a guarantee of the credit of a third person (*Colvin*, 1867, 5 M. 603; *Hamilton*, 1873, 1 R. 72; Simpson's claim *in re Cunningham & Co. Lim.*, 1887, 36 Ch. Div. 532).

Forms which the Contract may take.—A contract of cautionry may be constituted by any writing which, on a fair interpretation, imports a promise to a creditor to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is liable in the first instance. In determining whether the relation of principal and surety exists, the law looks beneath the form of the transaction to its real nature. Thus, on the one hand, a person may use the term "guarantee," and yet his undertaking may not import an obligation of the nature of cautionry (*Wilson*, 1840, 1 Rob. App. 137); and, on the other hand, although there is no express mention of guarantee or other technical phrase, the parties may be effectually bound as principal and surety (*M'Kenzie*, 1831, 5 W. & S. 504, per L. Chanc.). The contract may be made directly by a letter of guarantee or a bond of caution or cash credit, or it may be read out of the correspondence and actings of the parties (*Wallace*, 1895, 22 R. (H. L.) 56). Again, as has been pointed out, the relation may be constituted by an order to furnish goods, or lend money, to a third person, who himself is liable in payment; by a Letter of Credit (*q.v.*); by a Bond of Corroboration (*q.v.*); or by a guarantee of payment or collection of bills of exchange or promissory note, endorsed thereon. Again, the relation of principal and cautioner may arise out of the construction put by the law on the contract of partnership, each partner of a firm being a cautioner for the firm (Bell, *Prin.* s. 351; Bell, *Com.* ii. 506); or out of the interpretation put by the law merchant on the signatures to bills. Further, the cautioner's obligation may be contained in the same instrument as the obligation of the principal debtor, or in a separate instrument (Bell, *Com.* i. 364); and it may be undertaken either previously to the obligation of the principal debtor,—provided the parties contemplate the future liability of a third party as the basis of their present contract,—or contemporarily, or subsequently.

Offer and Acceptance.—In cautionry, as in other consensual contracts, there must be a concurrence of intention in two parties,—the cautioner and the creditor; the former offers to guarantee the debt of another, and the latter accepts the offer. In regard to the offer, all that is necessary is that the words convey the meaning, and are understood by the other party to import, that the writer intends to offer a guarantee (*Wallace*, 1895, 22 R. (H. L.) 56; see, in particular, per L. Watson, at 65). There is frequently a difficulty in discriminating between a completed contract and a mere proposal or tender of a guarantee, which must be definitely accepted before it becomes a completed contract. An offer of guarantee is not in itself binding: at any time before acceptance it may lapse by the death of either party, or be withdrawn by the party making it. It depends, however, on the character and terms of an offer whether express notice of acceptance is required, or whether an implied acceptance by acting

on it is sufficient. Express acceptance of the offer is necessary in all cases where the offer contemplates such express acceptance, or where the terms of the offer do not show a clear intention on the part of the sender that it should be conclusive (*M'Leer*, 1813, 1 M. & S. 557; *Mozley*, 1835, 1 C. M. & R. 692; *Thomson*, 1854, 16 D. 943; *Veitch*, 1864, 2 M. 1098). Also, any indication in a letter of guarantee that the writer expects something to be done preliminary to his being bound, makes express notice of acceptance imperative (*Mozley*, 1835, 1 C. M. & R. 692). On the other hand, where an offer of guarantee is definite, unconditional, and unambiguous,—however elliptically it be expressed,—acceptance will be implied if the person to whom it is sent acts on it, though he does not expressly notify his acceptance (*Pope*, 1840, 9 C. & P. 564; *Wallace*, 1895, 22 R. (H. L.) 56; *Kennaway*, 1839, 5 M. & W. 498). This is especially true where the guarantor directly undertakes to be responsible for a debt already incurred, or where the offer is to guarantee a specific transaction or set of transactions, the amount and extent of which are definitely known to the guarantor at the time of making the offer (*Kennaway*, 1839, 5 M. & W. 498; *Wilson & Corse*, 1797, Hume's *Decisions*, 85). Even, however, in the case of a guarantee of prospective or contingent debts to be contracted or liabilities to be incurred, the amount and extent of which are undefined and unknown to the guarantor at the time of making the offer, an acceptance may be implied from conduct (*Ewing*, 1808, 14 F. C. 172; *Grant*, 1818, 6 Dow, 239; see per L. Eldon, at 252). Such a guarantee of future dealings, if it is gratuitous and has not been formally accepted, may be withdrawn at any time, as regards liabilities not actually incurred, on due notice of revocation being sent to the creditor (*Offord*, 1862, 12 C. B. (N. S.) 748). Where, by the terms of the offer, liability under the guarantee is made to depend on certain contingencies, it is the duty of the creditor, in addition to giving express notice that he accepts the guarantee, to advise the guarantor of the occurrence of the contingencies; if he fail to do this, the guarantor may not know that any use has been made of his guarantee, and through his ignorance may lose opportunities of obtaining indemnity from the principal debtor (*Grant*, 1818, 6 Dow, 239; see *infra* as to conditions in guarantees). Finally, in determining whether there exists a completed contract of guarantee, there is frequent occasion for the application of the general rule in the law of contract laid down in *Freeman* v. *Cooke* (1848, 2 Exch. 654), and frequently approved: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party, upon that belief, enters into the contract with him, the man thus conducting himself will be equally bound as if he had intended to agree to the other party's terms." Thus, where a defender signs, undoubtedly by mistake, a guarantee which gives full effect to the pursuer's intentions, and the defender is thus deceived by the reasonable reading of the guarantee as to what has been the pursuer's meaning, the defender cannot alter his contract by turning round and saying, "I meant what I have not stated; and although you have relied upon my statement, I will only be liable for what I meant" (*Hayman*, 1872, 25 L. T. Q. B. 903; *Magistrates of Aberdeen*, 1858, 20 D. 668; *Wallace*, 1895, 22 R. (H. L.) 56).

Necessity of Fairness of Representation on the part of the Creditor.—In cautionry, there is no obligation on the part of the creditor to make a full disclosure to the proposed cautioner of all the circumstances material to the risk of which the creditor may be cognisant (*Young*, 1889, 17 R. 231. As to the difference in this respect between contracts of insurance and contracts of guarantee, see per Blackburn, J., in *Lee*, 1865, 34 L. J. C. P. 131, at 138). It

lies with the cautioner or guarantor to satisfy himself as to the position and credit of the principal debtor; and, unless questions are put by him to the creditor, it is unnecessary for the latter ultroneously to disclose what he knows as to the debtor's position (*Hamilton*, 1845, 4 Bell's App. 67). On the other hand, where the creditor, either spontaneously or in reply to questions by the proposed cautioner, does make a representation, such representation must be a full and fair one. If the creditor, in making his statement, conceals any fact which obviously or materially affects the risk, or if, even from mere carelessness, he so misrepresents the facts as to mislead the cautioner as to the hazards of his undertaking, the latter will be liberated (*Railton*, 1844, 6 D. 536; reversed 1844, 3 Bell's App. 56; *British Guarantee Association*, 1853, 15 D. 834). Further, a statement which is true, so far as it goes, may be accompanied by such a suppression of facts as to convey a misleading impression, or may be of such a partial and fragmentary nature as that the withholding of that which is not stated makes that which is stated practically false. A cautioner, who has in this manner been caused to view the circumstances in a false light, is entitled to get rid of his obligation (*Royal Bank of Scotland*, 1844, 6 D. 1418). Still further, if in the relations between the creditor and the principal debtor there exists some fact material to the risk, which the cautioner might naturally not expect to exist, the non-communication of this material fact may be treated as an implied representation that it does not exist, with the result that the cautioner will be liberated from his engagement (*Falconer*, 1863, 1 M. 704; see also the opinions of Lords Lyndhurst and Campbell in *Hamilton*, 1845, 4 Bell's App. 67). This rule, that the concealment of a material circumstance, which the cautioner might reasonably not expect to exist, will be construed as constituting an implied representation that the circumstance in question does not exist, is most frequently illustrated in guarantees of the good conduct of servants or agents. The position of a guarantor in an obligation of this kind is in many respects more disadvantageous than that of the guarantor of a money debt; while, on the other hand, the employer is usually in a position to form a fairly correct opinion as to his servant's trustworthiness. Accordingly, the Courts, in this class of cases more readily than in guarantees of money debts, hold the contracts of cautioners to be void upon the ground of implied misrepresentation (Bell, *Com.* i. 380; *Railton*, 1844, 3 Bell's App. 56; *French*, 1893, 20 R. 966). So strictly is the doctrine of implied misrepresentation applied in guarantees of the fidelity of servants or agents, especially where the creditor is cognisant of previously discreditable conduct on the part of the person for whom the cautioner intervened, as in effect to lay upon the creditor the whole duty of protecting the interest of the cautioner by spontaneously giving him full information as to the character of the person whose conduct is guaranteed; and this holds even where the cautioner intervenes wholly at the request and in the interest of the employee (see per L. Trayner in *French*, 1893, 20 R. 966, at 973).

Proof of the Contract.—From an early period, cautionary obligations—though, according to what appears the better opinion, constituted by consent—could in the ordinary case be proved only by written instrument (Ersk. iv. 2. 20; Bell, *Com.* i. 388). Further, though the old Scots statutes regulating the authentication of deeds properly relate only to operative writings constituting obligations or titles, and do not apply to documents used only *in modum probationis* in setting up consensual contracts (see *Bryan*, 1892, 19 R. 490, where this matter is fully discussed, and the authorities sifted by L. Kyllachy, whose reasoning was expressly

approved in the Inner House), yet, owing to the tendency in the older law in every case, where proof in writing was necessary, to require a formal instrument authenticated in the manner prescribed by the old Scots statutes, it undoubtedly became the general rule to require that the written instrument evidencing the obligation should be holograph or probative in terms of the statutes (*Church of England Life Association Co.*, 1857, 19 D. 414. The law on the subject, however, does not appear to have been perfectly settled. Compare, *e.g.*, the contradictory statements in Dickson on *Evidence*, s. 600 (3), and in Bell, *Prin.* s. 249). In cautionry, of course, as in other obligations, an improbative writ was sufficient to evidence the obligation, if either it had been followed by *rei interventus* or if it was given *in re mercatoria*. In other words, if a man by improbative writing undertook a cautionary obligation, and actings of the kind which he contemplated followed upon it, then these actings put an end to the *locus poenitentiæ*, and barred the party who had granted the informal obligation from any right to resile (*Johnstone*, 1844, 6 D. 875; cf. *Goldston*, 1868, 7 M. 188). So, again, if a cautionary obligation were *in re mercatoria*, it could be validly proved by a document which was merely subscribed; and if the authenticity of the document were disputed, its genuineness might be established by proof *prout de jure* (Bell, *Com.* i. 324; Dickson on *Evidence*, s. 793). Further, at common law, it was well established that guarantees could, in certain cases, be proved without the existence of writing in any form. Thus it had always been held that the obligation of a cautioner, at least where it had been followed by *rei interventus*, might be established by an oath on reference (Bell, *Prin.* s. 249; Dickson on *Evidence*, i. s. 602). Again, where a cautionary obligation was an integral part of a larger contract competent to be set up by parole evidence, the parole evidence was admitted to set up the subsidiary contract of the cautioner as well as the larger contract (Bell, *Prin.* s. 249; *Bell*, 13 Nov. 1812, F. C.).

Proof of the Contract under the Mercantile Amendment Act, 1856.—It is provided by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60, s. 6), that "all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit and ability, trade or dealings of any person made or granted to the effect, or for the purpose, of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations or assurances, or by some person duly authorised by him or them; otherwise the same shall have no effect." The effect of this provision is clearly to compel the Courts to refuse to enforce a guarantee or cautionary obligation, however completely it may be proved, unless it is in writing and signed as the statute prescribes. The Act does not, however, decide whether, in any given case, the mere signature of the granter is enough, or whether the document must be holograph or probative. The question whether, in any particular case, formal attestation is necessary, remains therefore to be settled by the rules in force before the Act (see L. M'Laren's note on this provision of the Mercantile Law Amendment Act in his edition of Bell, *Com.* i. 407). As has been pointed out, the earlier law on this matter is not free from doubt. On the one hand, it is laid down by Prof. Bell that "a writing of which the subscription is acknowledged is good evidence of cautionry" (Bell, *Prin.* s. 249); and if writing in cautionry is required only

by way of proof and not in solemnity (see *supra*, p. 336), it would be more in accordance with principle to hold that a formally attested writing was not necessary (see per L. Kyllachy in *Bryan*, 1892, 19 R. 490). On the other hand, there is weighty authority for holding that, at common law, the writing, if neither followed by *rei interventus* nor granted *in re mercatoria*, must be formally authenticated in terms of the statutes (see authorities collected in Dickson on *Evidence*, s. 602; also *Church of England Life & Fire Assurance Co.*, 1857, 19 D. 414). Certainly the words of sec. 6 of the Mercantile Law Amendment Act do not appear to contemplate that, in addition to the obligant's signature, the document should be formally attested. It is noteworthy, also, that under the corresponding statutory provision in England (the Statute of Frauds, 29 Chas. II. c. 3, s. 4) the mere signature of the granter of a guarantee is sufficient without further attestation; and it has been expressly laid down by the highest authority, that the effect of sec. 6 of the Mercantile Law Amendment Act has been to extend the law of England on this particular matter to Scotland (see per L. Blackburn in *Walker's Trs.*, 1880, 7 R. (H. L.) 85, at 88). (Compare the construction put by the Courts on the somewhat analogous provision in the Statute 1695, c. 5, that the written proof of trust should be "lawfully subscribed by the person alleged to be trustee.") The question, however, whether a formally attested document is necessary, or whether a writing merely signed by the granter is sufficient, is in most cases one rather of theoretical interest than of practical importance. In all mercantile guarantees a writing signed merely by the guarantor or his agent is sufficient (*Paterson*, 31 Jan. 1810, F. C.; affd. H. L. 1814, 6 Pat. 38; as to whether a letter of guarantee for advances by a bank to a merchant is *in re mercatoria*, see *Johnstone*, 1844, 6 D. 875, and *National Bank of Scotland Lim.*, 1892, 19 R. 885). Again, if advances have been made on the faith of the obligation, or if it has been acted on by the creditor, it would be binding, upon the principle of *rei interventus*. On the other hand, if an informal letter, merely signed by the guarantor, has not been acted on, and has not been expressly accepted by the creditor, the granter may withdraw it at any time before it is acted on (per L. Eldon in *Grant*, 1818, 6 Dow, 239). Also, of course, a party who takes a letter of guarantee which is neither holograph nor attested, exposes himself to the disadvantage of having to prove not only the genuineness of the signature, but also that the signature was adhibited to the document as it stands, or that there was authority to write over it what appears to have been written there (*Wylie & Lochhead*, 1889, 16 R. 907).

Statutory Requisites of Authentication.—The provisions in sec. 6 of the Mercantile Law Amendment Act are in substance the same as the enactments contained in the English statutes known respectively as the Statute of Frauds (29 Chas. II. c. 3, s. 4) and L. Tenderden's Act (9 Geo. IV. c. 14, s. 6); and the purpose and effect of this section was, as explained by L. Blackburn, to extend the law of England in this particular matter to Scotland (per L. Blackburn in *Walker's Trs.*, 1880, 7 R. (H. L.) 85, at 88). Accordingly, the English decisions on the corresponding sections of these English statutes are in point in determining the true interpretation of sec. 6 of the Scots statute.

Form and Contents of the Writing required by the Statute.—In England it is quite settled that writing is necessary only in evidence of the contract, and not in solemnity; and though the words of the Scots statute, "otherwise the same shall have no effect," are stronger than the corresponding words of the English statute, it is probable that the correct interpretation

of the Scots statute is similar (see opinion of L. Wellwood in *Wallace*, 1895, 22 R. (H. L.) 56, at 58). As to the form of the writing, it is held in England that the names, or a sufficient description of the contracting parties, particularly of the party guaranteed, must appear *ex facie* of the written document (*Williams*, 1859, 29 L. J. Q. B. 1). In a Scots case, however, a guarantee for the payment of an instalment of a composition on a bankrupt estate was held not to be void by reason of the creditors in the obligation not being definitely named—it being clear who the persons were in whose favour it constituted a right (*Clapperton*, 1881, 8 R. 1004). Also the promise must be reasonably clear; for if the writing is so vague that the nature of the undertaking cannot be made out from the terms of the instrument, it will not constitute a sufficient memorandum of the promise, and parole evidence is not admissible to supply or make out the promise (*Holmes*, 1859, 28 L. J. C. P. 301). The agreement need not be evidenced by a single paper; it is enough if the cautioner's undertaking can be read out of a number of separate papers, provided there exists sufficient connection in sense between them to enable the Court to couple them together and treat them as one document (*Hammersley*, 1845, 12 Cl. & Fin. 45; *Ridgway*, 1857, 6 H. L. C. 238). This connection, however, cannot be set up by parole evidence; it must, in order to satisfy the statute, appear upon the face of the documents themselves (*Crane*, 1868, L. R. 4 C. P. 123, per Willes, J.: *Peirce*, 1874, L. R. 9 Q. B. 210; *Oliver*, 1890, L. R. 44 Ch. Div. 205; *Taylor*, L. R. [1893] 2 Q. B. 65). The writing may be contained in a letter to a third person (*Gibson*, 1865, L. R. 1 C. P. 1); or it may be merely an offer which has met with an express acceptance, or which has been impliedly accepted by being acted upon (*Wallace*, 1845, 22 R. (H. L.) 56; *Powers*, 1855, 4 El. & Bl. 511; *Smith*, 1857, 2 C. B. (N. S.) 67). The purpose for which the memorandum was made is quite immaterial, provided it embody the terms of an agreement, and is signed by the party undertaking the obligation (*re Hoyle*, L. R. [1893] 1 Ch. 84).

Subscription required by the Statute.—As regards the subscription, it is sufficient if the writing is signed by the person against whom it is sought to found liability, or by some one authorised by him. Parole evidence is admissible to show whether the surety really signed the writing, and in what capacity he signed it, provided that such evidence does not contradict the document itself (*Young*, 1883, L. R. 11 Q. B. D. 651). If the document be neither holograph nor tested, the creditor must of course be prepared to prove not only the genuineness of the signature, but also that it was adhibited to the document as it stands, or that there was authority given to write over it what appears to have been written there (*Wylie & Lochhead*, 1889, 16 R. 907). In construing the 4th sec. of the Statute of Frauds, which requires a "signature" and not a "subscription," the English Courts have held that the signature need not be at the end of the writing, but that it is sufficient, in whatever part of the document it be introduced, if it authenticate and affirm the contents (*Caton*, 1867, L. R. 2 H. L. 127; *Evans*, L. R. [1892] 1 Q. B. 593; *re Hoyle*, L. R. [1893] 1 Ch. 84; *Sims*, L. R. [1894] 2 Ch. 318). The use of the more definite term "subscribed" in sec. 6 of the Mercantile Law Amendment Act, instead of the more general term "signed" in the English statute, may lead our Courts to a more strict interpretation of what is required to satisfy the Scots statute. In England, the initials of the obligant, or his mark, are a sufficient signature within the statute (Notes in Smith's *Leading Cases*, 10th ed., i. 322).

The authority of the person authorised to subscribe may be either express or implied, and need not be proveable in writing (*James*, L. R. [1891]

1 Ch. 384). Wherever one has authority to enter into a contract of guarantee on behalf of another, he has an implied authority to sign the writing which is necessary for the effectual execution of the contract (*Durrell*, 1862, 1 H. & C. 174). So a partner is an agent authorised to sign on behalf of all the members of his firm, provided that the guarantee in question is given in a transaction in the line of the partnership business (*ex parte Harding*, 1879, L. R. 12 Ch. Div. 557).

Rules of Construction.—Where a cautionary obligation is embodied in a formal bond, it is a general rule of construction that the obligation of the cautioner is to be interpreted strictly (Bell, *Prin.* ss. 251, 285, and cases there cited). The strict interpretation of a bond of caution means practically that the cautioner's responsibility is not extended beyond the precise terms of his engagement, and that, where these terms are ambiguous, the cautioner has the benefit of the doubt (*Baird*, 1835, 14 S. 41; *Napier*, 1840, 2 D. 556; affd. 1842, 1 Bell's App. 78). On the other hand, where a cautioner is bound in an ordinary mercantile guarantee, there is no presumption either way in regard to the construction of the document. Such a document is construed according to its fair meaning, when read in the light of surrounding circumstances (*Veitch*, 1864, 2 M. 1098; *Caledonian Bank*, 1870, 8 M. 862). Very often the writing containing a guarantee is quite informal, or is expressed in highly elliptical language, so that it is difficult to get any definite meaning out of it by construing the document by itself. In these circumstances it is both competent and necessary, before the contract can be applied, to ascertain the position of the parties at the date when the transaction was entered into (*Barr*, 1840, 3 D. 59; *Caledonian Banking Co.*, 1870, 8 M. 862). So the usage of the trade, in respect to which a mercantile guarantee is granted, may be proved by parole. Such evidence may attach a special meaning to expressions in the document, and may also be important in determining the nature and extent of the liability incurred by the guarantor (*Maclaggan*, 19 Nov. 1813, F. C.; *Calder & Co.*, 1889, 17 R. 74, see per L. P. Inglis). While parole evidence of surrounding circumstances or of trade usage is competent to expound the language and ascertain the real intention of the contracting parties as expressed in the writing, it cannot avail to contradict or vary the language of the written contract; and, further, the proof of mere verbal communings or statements made by the parties at the time when the guarantee was given is always incompetent (*Thorburn*, 1863, 1 M. 1169, per L. Deas). In all cases, the construction of a guarantee, as of any other written contract, is a question for the Court alone; and the examination of witnesses as to the interpretation which they would put upon the written instrument is incompetent (see opinions in *Calder*, 1831, 5 W. & S. 410; *Kirkland*, 1839, 3 Macq. 766).

Conditions precedent to the Cautioner's Liability resulting from Agreement.—A condition may be imported into a guarantee either by means of a representation or undertaking by the creditor, on the basis of which the contract is made (*Culcreuch Cotton Co.*, 1823, 2 S. (N. S.) 450; *Haworth & Co.*, 1891, 18 R. 563), or in the form of an express agreement between the parties, which, in the ordinary case, is embodied in the terms or provisions of the written instrument, but may be imported into it by reference (*Walker*, 1837, 15 S. 526). In contracts of guarantee, both undertakings preliminary to the contract and provisions or stipulations in the contract itself are readily construed by the Courts as constituting conditions, especially where the obligation of the cautioner has been undertaken gratuitously; and when once an undertaking or stipulation is ascertained to be a condition, the breach or non-fulfilment of it on the part of the creditor *eo ipso*

liberates the cautioner from his engagement, though it cannot be shown that the latter has incurred any loss through its non-performance (*Grieve*, 1839, 1 D. 738; *Drummond*, 1834, 14 S. 437). By express stipulation, acts or events of the most various kinds may be made conditions precedent to the cautioner's liability. "Parties may think some matter, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one" (per Blackburn, J., in *Bettini*, 1876, 1 Q. B. D. 183, at 187). The conditions which are most commonly expressly stipulated for, are those of a precautionary nature made with a view to guard the cautioner against loss, as, for instance, that a policy of insurance be effected (*Watts*, 7 H. & N. 353); that an invoice and note of the price of the goods, whose payment is guaranteed, should be sent (*Thomson*, 1854, 16 D. 943); that the principal debtor should periodically account to the creditor (*Hamilton*, 1706, Mor. 2091); that satisfactory references be given (*Morten*, 1863, 33 L. J. Ex. 54). A condition, though not expressly stipulated for, may be read out of the terms of a guarantee. Where, for example, a guarantee bears to be undertaken in consideration of something being done by the creditor, the doing of that thing is a condition precedent to the creditor's right to enforce the guarantee (*Lawrence*, 1862, 31 L. J. C. P. 143; *Rolt*, 1856, 18 C. B. 673). Similarly, where in a guarantee a certain course of conduct is marked out for the creditor, the mode of procedure so marked out must not be departed from by the creditor; for such a departure would be a violation of the implied agreement between the parties (*Murray*, 1882, 9 R. 1040; cf. also *Drummond*, 1836, 14 S. 437).

Proof of Conditions not contained in the Written Instrument.—An undertaking by the creditor, or an agreement between the creditor and the cautioner, may be quite effectual to constitute a condition precedent to the liability of the cautioner, although it is separate from the written contract, and is not referred to in the bond of caution or letter of guarantee (*Stein's Assignees*, 1833, 11 S. 373; affd. 1834, 7 W. & S. 489; *Culcreuch Cotton Co.*, 1823, 2 S. (N. S.) 450; *Wilson*, 1833, 11 S. 345). As regards the proof of undertakings and agreements, which, though existing apart from the written instrument setting forth the contract, yet serve to import conditions into the cautioner's obligation, it is a general rule that they can be set up only by writing or by the oath of the party whose right is limited by the alleged condition (*Jackson*, 1875, 2 R. 882; Dickson on *Evidence*, ss. 1017, 1020); for when parties embody their agreement in a written instrument, there is a presumption that the instrument contains a full exposition of the terms of the agreement (Tait on *Evidence*, 316). The presumption that the written contract contains all the terms and conditions of the agreement, may, however, be rebutted, and the door may be opened to oral proof by admissions on record that the written contract does not contain a true or full account of the transaction, or by the production of writings of the creditor, however informal, leading to a similar conclusion (*Blackwood*, 1858, 20 D. 631; *Grant's Trs.*, 1875, 2 R. 377; *M'Murray*, 1894, 31 S. L. R. 531; *Culcreuch Cotton Co.*, 1823, 2 S. (N. S.) 450). While it is only in special circumstances that it is competent, in a question between the creditor and the obligants, to add a term or condition to a formal written contract, or to qualify the written instrument, by parole evidence, it is always admissible to lead oral evidence to establish agreements between the obligants with a view to regulating their rights and liabilities *inter se* (*Kilpatrick*, 1841, 4 D. 109; *Smollett*, 1793, Mor. 12354). Thus an agreement between the cautioner-obligants in a cash-credit bond, under which a special security was to be

held by one of the cautioners and not to to be communicated by him to the others, was allowed to be proved by parole (*Hamilton*, 1889, 16 R. 1022). The oral evidence in such a case is not adduced for the purpose of contradicting or altering the conditions of the written document, but to prove a separate agreement, regulating the mutual rights of the cautioners *inter se*.

In the common case of a cautionary obligation being constituted through the machinery of a bill of exchange or promissory note, the competency of parole evidence in proving collateral agreements, importing conditions, has been greatly widened by sec. 100 of the Bills of Exchange Act, 1882, which provides that "in any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence" (45 & 46 Vict. c. 61, s. 100). The effect of this section is probably to assimilate the law of Scotland in this matter to that of England: and in England a supplementary agreement, entered into between the creditor and the parties to a bill or note, and qualifying, or rendering conditional, the liability of a party to the bill or note, may be proved by parole (*Lawrence*, 1862, 31 L. J. C. P. 143). Parole evidence, however, is still incompetent to contradict the contract on the bill or note (*National Bank of Australia*, 1891, 18 R. 629; *Gibson's Trs.*, 1896, 23 R. 414).

Conditions precedent to the Cautioner's Liability implied by Law.—Certain conditions precedent to the liability of a cautioner are implied by law. Thus it is an implied condition of the liability of a cautioner, that there should come into existence a valid obligation on the part of the principal debtor (*Lakeman*, 1894, L. R. 7 H. L. 17); also that, before the cautioner be called on, the principal debtor should have failed to perform his obligation. So, where several persons are to join in a cautionary obligation, it is a condition precedent to the liability of each signatory that the bond should be duly signed by the whole number (*Paterson*, 1844, 6 D. 987; *Provincial Assurance Co.*, 1858, 20 D. 465. In bonds of judicial cautionry, however, there is no duty on the creditor to see that the bond is duly signed; and accordingly, in a bond of caution in a suspension, it was held that the fact of one of the cautioner's signatures turning out to be forged, did not prevent the bond being enforced against the others who had signed (*Simpson*, 1860, 22 D. 679)). So it is an implied condition of the continuance of the liability of a cautioner, that in all transactions subsequent to the original contract the creditor preserve intact all the cautioner's remedies. (As to the acts on the part of the creditor which liberate the cautioner, see *infra*, p. 34 *et seq.*)

Extent of Cautioner's Liability.—As cautionry is a strictly accessory contract, it is a fundamental rule that, while a cautioner may be bound for the whole of the principal debt, he can in no case be bound for a greater sum than that due by the principal debtor (Ersk. *Inst.* iii. 3. 64; *Jackson*, 1875, 2 R. 882). While the cautioner's obligation cannot be more onerous than that of the principal debtor, it may be in any degree less onerous, either in respect of its amount or in respect of the time, place, or manner of its performance (Just. *Inst.* iii. 21. 5; *Dig.* 46. 1. 8. 7). In the ordinary case, where there is no limitation or restriction on the cautioner's liability, the cautioner is held to have made himself liable for the actual transaction as arranged between the principal parties, so that the measure of his liability is the total actual loss sustained by the creditor from the debtor's failure to perform his obligation (*Calder & Co.*, 1889, 17 R. 74; *Anderson*, 1876, 3 R. 608). On the same principle, the cautioner's liability, if his guarantee is undertaken in general terms, extends to any incidental debts due by the

principal debtor to the creditor arising directly out of the primary obligation; as, for instance, to a claim for interest on the debt, if it be not paid when due (*Ackerman*, 1846, 16 M. & W. 99); or to a claim for expenses necessarily incurred by the creditor (*Clarke*, 1833, 12 S. 158). A creditor, however, to whom a guarantee has been given, must be cautious in incurring incidental expenses, in reliance upon being recouped by the guarantor (*Grant*, 1853, 15 D. 424; *Colvin*, 1841, 8 M. & W. 680). No act of the principal debtor can enlarge the cautioner's liability, and no admission or acknowledgment by him can burden the cautioner with responsibility for any sum other than that which was really due (*Ex parte* Young, *in re Kitchin*, 1881, 17 Ch. Div. 668). In estimating the extent of a cautioner's liability, the precise terms of his obligation are looked to, and any restriction therein indicated will be given effect to against the creditor. Such a restriction may be read out of expressions in the narrative of the bond (*Napier*, 1840, 2 D. 556: affd. 1842, 1 Bell's App. 78); or may arise from the strict construction put on phrases or terms in the body of the instrument (*North of Scotland Bank*, 1882, 10 R. 217; *Rennie*, 1866, 4 M. 669); for, as has been pointed out, formal bonds of caution are construed strictly in favour of the cautioner. So, if one becomes cautioner for a person as the holder of a particular office, his liability does not extend beyond the principal debtor's intromissions in that particular office (*Maxwell's Trs.*, 1862, 24 D. 1181; *Morland*, 1831, 9 S. 478; *University of Glasgow*, 1790, M. 2104). Again, a guarantee is presumed to refer only to future dealings, and will not cover existing debts or past intromissions of the principal debtor, unless the language of the cautioner's obligation is clearly broad enough to include them (Bell, *Prin.* s. 285; *Dykes*, 1825, 4 S. 69; *Paterson*, 1844, 6 D. 987, at 995). If a bond or guarantee is given by a cautioner to secure the payment of goods sold to the principal, or the repayment of money advanced to the principal, and a certain sum is named beyond which the cautioner is not to be liable, the effect of this limitation, in the ordinary case, is not to restrict the dealing between the creditor and the principal debtor, but merely to protect the cautioner from being liable beyond the amount named (Bell, *Prin.* s. 285: Smith, *Mercantile Law*, 10th ed., i. 579). The limitation, however, may be so expressed as to render it a condition of the cautioner's liability that the dealings between the principal debtor and the creditor shall not exceed the limit named; and if this appears to be the intention of the parties, the cautioner's obligation will be void if the purchases or advances go beyond the limit (*Kinross*, 1677, 3 Bro. Supp. 212). If a guarantee bears to be granted to, or for, a particular person or firm, the liability of the cautioner is limited to the advances made or goods furnished by, or to, the particular person or firm named (*Stewart*, 1803, Hume, 91: *Bowie*, 1840, 2 D. 1061; *Philip*, 21 Feb. 1809, F. C.; *Montefiore*, 1863, 12 W. R. 83).

Continuing and Limited Guarantees.—A question frequently arises as to the extent of time during which a guarantor is liable for the transactions of the principal debtor. If the undertaking of the cautioner covers a course of dealings to be carried on from time to time, to which—though a limit may be set in point of amount—no limit of time is set, either expressly or by implication, it is a standing or continuing guarantee, and the cautioner is liable for any balance which may from time to time be due by the principal debtor to the creditor. Where, on the other hand, a particular transaction or definite set of transactions is pointed out, or where the liability of the guarantor is definitely limited to a specified time, it is a limited or non-continuing guarantee, and payments made by

the principal debtor to the creditor after the particular transactions referred to, or after the expiry of the specified period, go to reduce the cautioner's liability to the extent of these payments. In determining to which category any given guarantee belongs, not much assistance is to be derived from precedents; for, though there have been many cases turning on this distinction, each case is necessarily to a large degree special, being decided not only upon the actual words used, but also largely on the circumstances in which they were used (see per L. J. C. Inglis in *Caledonian Banking Co.*, 1870, 8 M. 862). It is to be observed, however, that the mere fact that a guarantee bears to be for a fixed sum of money, does not make the guarantee limited in the sense of being applicable only to a particular transaction or set of transactions within a definite period. In cash-credit bonds, for example, the liability is limited in amount, and yet such bonds are continuing guarantees. (The specialties relating to the liability of cautioners under cash-credit bonds are treated under CASH-CREDIT (BOND FOR), and therefore are not dealt with in this article). The course of dealing between the creditor and the principal debtor, with reference to which the guarantee was given, and which the guarantor is presumed to know, is an important element in determining whether a guarantee is continuing or limited (*Calder & Co.*, 1889, 17 R. 74). Thus, where a guarantee has reference to a current account, or is given in connection with a course of dealing or trade, which in its nature goes on for a length of time, it will readily be construed as continuing (*Forbes*, 1830, 8 S. 865; *Caledonian Banking Co.*, 1870, 8 M. 862; compare the English cases, *Laurie*, 1869, L. R. 4 C. P. 622, and *Nottingham Hide, Skin and Fat Market Co.*, 1873, L. R. 8 C. P. 694). The employment of the word "any" in the guarantee points strongly to the guarantee being continuing (Bell, *Prin.* s. 284). Yet, in several Scots cases, guarantees, in spite of the occurrence of the word "any," have been held to be limited (*Baird*, 1835, 14 S. 41; *Slade*, 1808, Hume, *Decisions*, 95; see also *Scott*, 1866, 4 M. 551). Other instances of guarantees held to be limited to specific transactions or advances may be found in *Nicholson*, 1832, 1 C. & M. 48; *Allnutt*, 1843, 5 M. & G. 392; *Coles*, 1869, L. R. 5 C. P. 65.

Rights and Privileges of Cautioners.—At common law cautioners have certain rights and privileges, which are important in regulating their respective liabilities. Of these rights and privileges, the right of discussion belonged, and the right of division belongs, only to cautioners in a proper cautionry; while the right of total relief against the principal debtor, and the right of mutual relief or contribution among themselves, belong to all cautioners, proved to be such, whether bound in proper or improper cautionry.

Beneficium ordinis, or Benefit of Discussion.—Formerly cautioners bound in a proper cautionry, had what was known as the benefit of discussion, or the *beneficium ordinis*, in virtue of which they were entitled to insist that the creditor, before using diligence against them for the debt, should do his best to compel the principal debtor to perform his obligation. In other words, the creditor in such a proper cautionry was bound, in the first instance, to "discuss" the obligant, whose proper debt it was, and to give the cautioners the full benefit and relief that could be derived from the principal debtor's estate (Bell, *Com.* i. 364; Ersk. iii. 3. 61). See DISCUSSION. The privilege of discussion has been to a great extent taken away by the Mercantile Law Amendment Act (19 & 20 Vict. c. 60, s. 8), which provides that "Where any person shall become bound as cautioner for any principal debtor, it shall not be necessary for the creditor, to whom

such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor to proceed against the principal debtor and the said cautioner, or against either of them, and to use all action or diligence against both or either of them, which is competent according to the law of Scotland: Provided always that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor." The effect of this section is that, immediately upon the default of the principal debtor, whether, in the case of an obligation payable on demand, by failure to meet a demand, or, in the case of an obligation payable at a fixed period, by the expiry of the period without payment, the creditor may proceed against the cautioner without being bound first to discuss the principal debtor, or even to constitute the debt against him in a separate action (*Morrison*, 1870, 9 M. 35). See DISCUSSION.

Beneficium divisionis, or Benefit of Division.—Where several cautioners are bound conjunctly for the debtor in a proper cautionary obligation, each of the cautioners is, in the first instance and so long as his co-cautioners are solvent, liable only for his own *pro ratâ* share of the debt (Ersk. iii. 3. 63; Bell, *Prin.* s. 267). On the other hand, cautioners who are bound in an improper cautionary obligation, that is, who are bound as full debtors, or conjunctly and severally with the debtor, do not possess the right of division, with the result that the creditor may, on the arrival of the date of payment, at once go against any one of the obligants for the whole debt, or against several of them in such proportions as he pleases (*Richmond*, 1847, 9 D. 633). See BENEFICIUM DIVISIONIS.

Right to Total Relief against the Principal Debtor.—A cautioner who has paid the debt, or any portion of the debt, has a right to relief and indemnification against the principal debtor to the full extent to which he has been made answerable for him. The obligation of the principal debtor to relieve the cautioner extends not only to the amount paid, with interest, but also to any expense incurred by the cautioner in defending an action for the debt, provided the defence maintained was a reasonable one (*Hannay*, 1840, 16 Fac. Dec. 42). Also, if a surety can prove that by reason of the non-payment of the debt he has suffered damage beyond the principal and interest which he has been compelled to pay, he will be entitled to recover that damage from the principal debtor (per Stirling, J., in *Badeley*, 1886, L. R. 34 C. D. 556). (As to the advantage of taking a bond of relief, see RELIEF, BOND OF.) The right of a cautioner to total relief against the principal debtor rests on two distinct principles. *Firstly*, as the implied mandatary of the principal debtor, the cautioner has the right, as by an *actio mandati*, to take legal measures for his relief against the principal. On this principle, if the cautioner is sued for payment by the creditor, he can, before making an actual payment, sue the principal debtor for relief, and, even before the arrival of the term of payment, he may use precautionary diligence, if the principal debtor is *vergens ad inopiam* (Ersk. iii. 3. 65; *Kinloch*, 1822, 1 S. 491; *M'Pherson*, 1885, 12 R. 942). *Secondly*, as regards the creditor, the right of relief rests on the principle of the *beneficium cedendarum actionum*, under which the cautioner, on paying the debt, is entitled to require the creditor to communicate the full benefit of his contract (Bell, *Prin.* s. 255). In virtue of this privilege, a paying cautioner is put for all purposes in the place of the creditor, both as regards the principal debtor and the other

cautioners. Accordingly, not only does there pass to the paying cautioner a right to sue the principal debtor for relief, but he is entitled to demand from the creditor an assignation of the debt, of any available diligence or remedy, and of all securities held for the debt (Bell, *Prin.* s. 255; *Erskine*, 1780, Mor. 1386; *Lowe*, 1825, 3 S. 543. For the application of the same principle in English law, see *Imperial Bank*, 1877, L. R. 5 C. D. 195; *In re L. Churchill*, 1888, L. R. 39 C. D. 174). Illustrations of the advantage accruing to the cautioner in certain cases by taking a formal assignation may be found in *Garden*, 1735, Mor. 3390, and *Brown*, 1852, 1 Stuart, 269. The cautioner who pays the debt has a valid claim to the benefit of securities in the hands of the principal debtor, though he did not know of their existence (*Duncan, Fox, & Co.*, 1880, 6 App. Ca. 1), or though they only came into the creditor's hands after the cautioner's obligation had been contracted (*Forbes*, 1882, L. R. 19 C. D. 615). In order, however, to entitle a cautioner to claim a cession of securities, he must pay the debt in full, and the payment of a dividend on his bankrupt estate is not full payment to this effect (*Ewart*, 1865, 3 M. (H. L.) 36). From this right of the cautioner to total relief against the principal debtor, and to a cession of all securities for the debt held by the creditor, there arises on the part of the creditor a duty to preserve intact all his remedies against the principal debtor, as well as to see that the securities held for the debt are not lost or abandoned. See BENEFICIUM CEDENDARUM ACTIONUM.

Right of Mutual Relief or Contribution in a Question with Co-Cautioners.—All cautioners, whether bound in a proper or an improper cautionary obligation, are, in a question with co-cautioners, ultimately liable only for their *pro ratâ* share of the debt. Accordingly, where any cautioner has paid a share of the debt greater than his proportionate share, he forthwith becomes entitled to claim from each of the others a rateable contribution to recoup himself for the excess which he has paid beyond his own share. A cautioner's claim of relief against co-cautioners does not extend to any part of the expenses which may have been incurred by him in defending an action by the creditor against him for the debt, unless the co-cautioners authorised him to defend the action (*Knight*, 1828, 1 M. & M. 247); but it does extend to interest on the money paid by the cautioner in excess of his *pro ratâ* share, from the date of such payment (*ex parte Bishop*, 1880, L. R. 15 C. D. 400). So a cautioner who voluntarily makes a payment—as, for instance, of a fee to an arbiter—which he was not under a legal obligation to pay, though he may have been morally bound to do so, cannot claim contribution from a co-surety in respect of that payment (*Henderson*, 1867, 5 M. 628).

The principle of mutual relief among co-sureties, being based on considerations of equity and not on any supposed contract between them, is equally applicable whether the sureties are bound in the same or in different instruments, and whether those bound in one instrument knew, or did not know, of the other instruments, provided all the instruments are, as a matter of fact, primary concurrent securities for the same debt (*Stirling*, 1821, 3 Bligh, 575; *M'Pherson*, 1881, 9 R. 306; *M'Donald*, 1883, 8 App. Ca. 733). The criterion which determines whether or not parties are co-sureties for the purpose of mutual relief or contribution, is simply whether the same default of the principal debtor makes them all responsible for the debt (see per Alderson, B., in *Pendlebury*, 1841, 4 Y. & C. (Ex.) 441; approved by Fry, J., in *Steel*, 1881, 17 Ch. Div. 825, and by Pearson, J., *in re Arcedeckne*, 1883, 24 Ch. Div. 709). Where, however, sureties are bound in separate instruments, having no reference to each other, so that the different obliga-

tions are separate and distinct transactions, and are conjunct neither *in re* nor *in verbis*, they have no right of mutual relief or contribution (*Morgan*, 1872, 10 M. 610). Though a formal assignation of the debt by the creditor is not necessary to enable a cautioner, on paying the debt, to effect his relief against his co-cautioners, yet there are cases in which it is advantageous to take such a formal assignation (see per L. Fullerton in *Erskine*, 1842, 4 D. 1478, at 1480).

In addition to his claim for contribution from his co-cautioners, the cautioner who pays the debt, or more than his share of the debt, has a right to participate in any security, ease, or relief which may have been obtained by any of his co-cautioners (Ersk. iii. 3. 70; Bell, *Com.* i. 367; *Cowan*, 1802, Hume, 85: see BENEFICIUM CEDENDARUM ACTIONUM). Cautioners, however, may, by agreement with a co-cautioner, contract themselves out of the benefit which is thus conferred on them by the common law; and such an agreement *inter se* may be competently proved by oral evidence (*Hamilton*, 1889, 16 R. 1022). Where, however, an agreement, taking away the right of all the cautioners to participate in a security, has been made between a favoured cautioner and the principal debtor, it is ineffectual to deprive the other cautioners of their right to share in the security, unless it is clearly proved that they knew of the agreement in question, and acquiesced in it (*Murray*, 1832, 10 S. 706; Bell, *Com.* i. 349; *Steel*, 1881, 17 C. D. 825).

The right of cautioners to mutual relief involves, on the part of the creditor, the duty of doing nothing to prejudice this right. If he neglect this duty and do anything to interfere with, or prevent effect being given to, the mutual claims of the cautioners to relief or to the benefit of securities, he liberates the cautioners from their engagement.

Bankruptcy of a Cautioner, the Principal Debtor and the other Cautioners being Solvent.—If, when the debt is exigible, one of the cautioners is bankrupt, while the principal debtor and the other cautioners are solvent, the creditor may, if he choose, rank on the estate of the bankrupt cautioner for the full amount of the debt, where the cautioners were bound *singuli in solidum*, or for the bankrupt cautioner's *pro ratâ* share where the cautioners were bound simply as cautioners in a proper cautionary obligation. In both cases, of course, the estate of the bankrupt cautioner has total relief for what is paid from the solvent principal debtor. If the bankruptcy of the cautioner occurs before the principal debt is exigible, the creditor is similarly entitled to rank on the bankrupt estate of the cautioner as a contingent creditor for the whole debt, or for the bankrupt cautioner's *pro ratâ* share, according as the cautionary obligation was improper or proper (Bell, *Com.* i. 368). The meaning of such contingent ranking is, that the creditor has a dividend on the cautioner's estate set apart as a security to meet the liability that would accrue to the cautioner upon the failure of the principal debtor to meet the obligation at its maturity (*Garden*, 1860, 22 D. 1190).

Bankruptcy of the Principal Debtor, Cautioners being Solvent.—On the bankruptcy of the principal debtor, the creditor may rank for the whole debt on the estate of the principal debtor, and claim from the cautioners the balance of the debt left unpaid by the dividends received from the bankrupt estate. He must, of course, deduct the value of any securities held by him from the principal debtor, as well as any partial payments of the debt which he may have received (*Hamilton*, 1841, 3 D. 494). When the creditor has ranked on the debtor's estate, the cautioners, when they have paid the difference between the dividends received by the creditor and 20s. in the pound of the debt due, cannot also rank on the debtor's estate in

relief of what they have paid (*Anderson*, 1876, 3 R. 608). To allow them so to rank would be to contravene the rule against the double ranking of the same debt. This rule does not apply to cases where the bankrupt compounds with his creditors without being sequestrated or deprived of his estate by a trust deed, but only to cases where the effect of the bankruptcy is to divest the bankrupt of his estate (*M'Kinnon*, 1882, 9 R. 393).

Again, the creditor, on the bankruptcy of the principal debtor, may go at once against the cautioners and compel them to pay the debt, instead of ranking on the estate of the principal debtor. When cautioners have paid the principal debt in full, whether they do so voluntarily or yield to a demand by the creditor, they forthwith stand in every respect in the place of the creditor, ranking on the bankrupt estate of the principal debtor for the sums they have respectively paid, and taking the full benefit of any securities for the debt held by the creditor (*Erskine*, 1780, Mor. 1386; Bell, *Com.*, M'L. ed., i. 365). If, after the creditor has drawn certain dividends from the principal debtor's estate, the cautioners step in and pay the difference between what the creditor has drawn from the estate and the whole amount due on the debt, they will be entitled to stand in the creditor's place and receive any future dividends (*ex parte Johnson*, 1853, 3 D. M. & G. 218).

Where the Principal Debtor and some of the Cautioners are Insolvent, while other Cautioners are Solvent.—Where, at the maturity of the obligation, the principal debtor and one or more of the cautioners are insolvent, while other cautioners remain solvent, the creditor has two methods open to him of enforcing payment of his debt (Bell, *Com.* i. 371). On the one hand, he may rank for the whole debt upon each of the insolvent estates, and demand from the solvent cautioners any balance remaining due after deducting all the dividends received from the various bankrupt estates (see per L. M'Laren in *Morton's Trs.*, 1892, 20 R. 72). The solvent cautioners must then share this loss between them without further relief, for, on the principles already explained, where the creditor has ranked, the cautioners cannot also rank on the estates of the bankrupt for the same debt. On the other hand, the creditor may at once demand payment from the solvent cautioners, leaving them to work out their relief as best they may from the bankrupt estate of the principal debtor and their insolvent co-cautioners. If the solvent cautioners are thus forced to pay, they may of course rank on the estate of the principal debtor for the whole sum which they have respectively paid: but they cannot rank upon the estate of any one of the insolvent cautioners for more than the excess beyond their *pro ratâ* share, which they have been compelled to pay owing to the insolvency of these obligants (*Keith* (*Maxwell's Tr.*), 1792, Mor. 2136; revd. 1794, 3 Pat. 350). It is therefore to the advantage of the solvent cautioners that the creditor should rank on the estates of his insolvent obligants, as in this way, his ranking being for the whole debt upon each estate, a larger sum in dividends is obtained; and, in practice, this is the usual arrangement (Bell, *Com.* i. 372).

Where the Principal Debtor and all the Cautioners are Insolvent.—Where the principal debtor and the cautioners are all insolvent, the creditor is entitled, where all are bound as co-obligants, to rank on the estate of each obligant for the full amount of the debt to the effect of obtaining thereby full payment. Payments to account, or recoveries from any source, made before bankruptcy must be deducted; but payments or recoveries from any source after bankruptcy are not deducted, except only the produce or value of any security held by the creditor before bankruptcy over the

estate of the bankrupt (see per L. P. Inglis in *Royal Bank of Scotland*, 1881, 8 R. 805, at 817). As the creditor can only rank on the estate of any particular obligant for the amount of the debt as it stood at the date of that obligant's bankruptcy, it is expedient from the point of view of the creditor that, where it is possible, claims should be made on the estates of all the bankrupt obligants before the amount of the debt is diminished by the payment of a dividend on the estate of any of them (*Hamilton*, 1841, 3 D. 494). Where the creditor has ranked upon each estate for the whole debt, no estate can be ranked in relief upon any other estate, although the dividends paid by one of the estates exceed the obligant's *pro ratâ* share. To allow such relief would clearly be to allow a double ranking of the same debt upon the estate which has paid the smaller dividend (*Anderson*, 1876, 3 R. 608). While the creditor is entitled to rank on the estate of each obligant to the effect of receiving full payment, he is not entitled to receive more than full payment; therefore, if the dividends declared on the estates of the various insolvent obligants together yield more than suffices to pay to the creditor 20s. in the pound of his whole debt, the estate of a co-obligant which has paid more than its share of the debt is entitled, to the extent of this excess, to benefit by the creditor's ranking upon the other estates (*ex parte Stokes*, 1848, De Gex, 618).

Extinction of the Cautioner's Liability.—The obligation of a cautioner may be brought to an end in a variety of ways.

Direct Discharge of Cautioner.—A cautioner's obligation may come to an end by his direct discharge, even while the principal debtor remains liable (Bell, *Prin.* s. 259). Such a direct discharge of a cautioner sometimes occurs when his solvency is suspected, and it becomes desirable to substitute a new cautioner in place of the suspected one. The consent of the other obligants is necessary to such a step unless the cautioner discharged is bankrupt.

Fulfilment of the Contract.—A cautioner is discharged by the contract being fulfilled. The contract may be fulfilled by the expiry of the period for which he undertook liability. Thus, where the cautioner's liability is limited in point of time, the expiry of the period, without there having occurred any default on the part of the principal debtor, extinguishes the liability of the cautioner. So, if the creditor allows the principal debt to prescribe, the liability of the cautioner is extinguished. In the ordinary case the contract is fulfilled and the cautioner's obligation comes to an end by the payment or performance of the principal obligation. If the principal debtor pays his debt, the benefit of the discharge enures to the cautioner. In order, however, that such a payment shall discharge the cautioners, it must be a valid payment. Thus, where a payment by one of two makers of a promissory note was voided by his supervening bankruptcy, as being an illegal preference, and the money returned, it was held that this payment did not discharge the other maker, who was merely a surety for his co-obligant (*Petty*, 1871, L. R. 6 Q. B. 790). The debt may also be satisfied, as regards the cautioner no less than as regards the principal debtor, through the operation of a claim of compensation or set-off as between the creditor and the principal debtor (*Hannay & Sons*, 1875, 2 R. 399; affd. 1877, 4 R. (H. L.) 43). Compensation does not *ipso jure* extinguish the debt; but when pleaded and sustained, it affords a complete defence against the claim of the creditor. So in England it was laid down by Willes, J., in *Bechervaise* (1872, L. R. 7. C. P. 372), upon the authority of a text in the civil law (*Dig.* 16. 2. 4), that where a creditor is equally liable to the principal debtor as the principal debtor to him, so that the principal

debtor has a good defence at law and equity to a claim against him, a surety, who would upon payment be entitled in equity to exoneration from the principal debtor, has in this state of things a defence against a claim by the creditor. Special circumstances, however, may prevent the creditor from being able to give effect to the plea of compensation (*Cullen*, 1852, 24 Sc. Jur. 177). Where a current account is kept between the creditor and the principal debtor, the law, in the absence of an appropriation of payments by either party, makes an appropriation according to the order of the items of the account, the first item on the debit side of the account being the item discharged or reduced by the first item on the credit side. Accordingly, where a limited guarantee is given to secure payment of a specific debt, or some definite balance due on the current account at a given date, all payments made by the debtor, which are entered into the account subsequently to the date in question, go to reduce the debt for which the guarantors intervened; and when such subsequent payments have been made up to the amount of the debt, the liability of the guarantor is extinguished (*Lang*, 1859, 22 D. 113; *British Linen Co.*, 1853, 15 D. 314; *Kinnaird*, 1878, 10 C. D. 139). On the other hand, where the guarantee is intended to cover the fluctuating balance which may be due to the creditor on successive transactions, no amount of subsequent payments of the debtor will discharge the liability of the guarantors, if, at the closing of the account, there remains a balance due to the creditor. Even in a guarantee of this latter kind, however, the doctrine of appropriation of payments in a current account may operate to extinguish the liability of cautioners if an event occurs which fixes the liability under the guarantee as at the event in question (*Houston*, 1829, 3 W. & S. 392; *Royal Bank of Scotland*, 1839, 1 D. 745; affd. 1841, 2 Rob. App. 118; cf. *Cuthill*, 1894, 21 R. 549).

Revocation of his Obligation by the Cautioner.—Where the cautioner's obligation is absolute for a certain period, the cautioner cannot, after his offer has been made and accepted, withdraw from his obligation without taking the debtor into his own hands. Where, however, an offer of guarantee for future advances has been made, but has not been formally accepted, the guarantor has it in his power, at any time before acceptance, to revoke his guarantee as regards future transactions, even where a fixed period was mentioned in the offer and that period has not expired, and even though, subsequently to the giving of the guarantee, certain transactions have taken place between the creditor and the principal debtor (*Offord*, 1862, 12 C. B. (N. S.) 748). A cautioner, who has granted a continuing guarantee for future transactions for an indefinite period, is entitled at any time to stop further dealings or advances on his responsibility by giving notice to the creditor that he will not be liable for further dealings or advances (Bell, *Prin.* s. 266; Smith, *Mercantile Law*, 10th ed., i. 580. As to the right of a cautioner for a bankrupt in a composition contract to withdraw, see Bell, *Com.* ii. 353; *Ironside*, 1841, 4 D. 629; *Lee*, 1883, 11 R. 26). In Scotland, it appears that a cautioner for the due performance by an official of the duties of an office, the tenure of which depends on the pleasure of the employer and employed, may put an end to his liability on giving reasonable notice to the employer, provided he takes due care to have his bond cancelled or delivered up (*Taylor*, 1818, Hume, 114; *Kinloch*, 1822, 1 S. 491; Bell, *Com.* i. 384). In England, on the other hand, it has been laid down that, "where a continuing relationship is constituted on the faith of a guarantee, there is strong reason for holding that the guarantee cannot be annulled during the continuance of the relationship" (per Fry, J., in *Lloyds*, 1880, L. R. 16 Ch. Div. 290, at 306). In every case,

however, where the person whose conduct is guaranteed is guilty of misconduct, the cautioner may, at once and without delay, revoke his guarantee (*Burgess*, 1672, L. R. 13 Eq. 450; *Phillips*, 1872, L. R. 7 Q. B. 666).

Death of the Cautioner.—It is settled that the death of a cautioner will not in itself, in the absence of a special stipulation to that effect, operate as a revocation of his guarantee, unless express notice be sent to the creditor; in other words, the guarantee remains binding on the deceased cautioner's representatives (Bell, *Com.* i. 385 and 387; *Morrice*, 1831, 9 S. 480; *British Linen Co. Bank*, 1858, 20 D. 557). Seeing that in many cases the executors of the deceased cautioner may be entirely ignorant of the existence of the guarantee, it is obviously proper that the creditor, on becoming cognisant of the cautioner's death, should inform his executors of the guarantee which the deceased had undertaken (see per L. Moncreiff in *Caledonian Bank*, 1870, 8 M. 862, at 868). Where the guarantee is of a kind which the cautioner himself could have determined by notice, it is probable that the intimation of the cautioner's death to the creditor would put an end to the responsibility of his estate for subsequent advances, although there is no express notice that the guarantee is to be withdrawn (*Coulthart*, 1879, L. R. 5 Q. B. D. 42, at 47).

Death of Principal Debtor or Creditor.—Where the contract between the creditor and the principal debtor is personal in its nature, as in a contract of service, the cautioner is discharged *quoad* future transactions, by the death of either of the principal contracting parties (*Barker*, 1786, 1 T. R. 287; *Low*, reported in More's *Notes to Stair*, i. 3). On the other hand, where the nature of the contract between the creditor and the principal debtor, or the language of the cautioner's contract, makes it clear that the guarantor must have intended his obligation to run on after the death of the creditor or the principal debtor, under their respective representatives, the cautioner's obligation will not be determined by the death of either of the principal parties (*Wilson*, 1836, 14 S. 262).

Discharge of Cautioners by the Conduct of the Creditor.—Cautioners are discharged by various acts on the part of the creditor, whereby their position as cautioners is prejudiced.

Positive Act by the Creditor injurious to the Cautioner.—In order to liberate cautioners, there must be some positive act injurious to the cautioner on the part of the creditor, or such a degree of negligence as to amount to fraud: the mere passive inactivity of the creditor or his neglect to call the principal debtor to account will not have this effect (*Black*, 1862, 15 Moore, P. C. 472; *M'Taggart*, 1835, 1 Sh. & M. 553). At the same time, if the negligence of the creditor—especially in guarantees of a person's good conduct—is so gross as to amount to a wilful shutting of his eyes to the default about to be committed by the principal debtor, or to imply connivance on his part at a departure from the conditions of the cautioner's obligation, this is sufficient to discharge the cautioner (*Mayor of Durham*, 1889, 22 Q. B. D. 394). The same effect will follow if the omission of the creditor to do something deprives the cautioner of a right or security, to the benefit of which he is entitled (*Wulff*, 1872, L. R. 7 Q. B. 756). Further, it would seem that less will suffice to establish a case of gross negligence, amounting to connivance, when the creditor is a bank than when the creditor is a private individual: for in the case of a bank certain regular checks are understood to subsist, upon which the cautioner is entitled to rely (see opinions in *Falconer*, 1843, 5 D. 866). In a guarantee of the good conduct of an employee, the omission of the employer to inform the cautioner of an act of dishonesty on the part of the

employee, or of a breach of duty on his part, whether accompanied by dishonesty or not, is equivalent to a positive act prejudicial to the cautioner. Such an omission, accordingly, discharges the cautioner (*Smith*, 1814, 1 Dow's App. 287; *Leith Bank*, 1830, 8 S. 721; affd. 1831, 5 W. & S. 703).

Alteration of the Contract by the Creditor.—A cautioner is discharged from his liability if, subsequently to the execution of his contract, the creditor consent to an essential change in the obligation of the principal debtor, or to any alteration whereby the position of the cautioner is prejudiced, without the assent of the cautioner (Bell, *Prin.* i. 289; *Bonar*, 1847, 9 D. 1537; affd. 1850, 7 Bell's App. 379). An extreme case of alteration is where a new contract is instituted in place of the original contract between the principal debtor and the creditor—in other words, where there has been novation (*Malling Union*, 1876, L. R. 5 C. P. 201; *Forbes*, Elchies, *voce* Cautioner, 4). Again, where a cautioner guarantees the due performance of the duties of an office by the holder of the office, if the duties of the office are subsequently materially altered, this alteration of the principal contract puts an end to the accessory obligation (*Pybus*, 1856, 6 El. & Bl. 902; *Leith Bank*, 1830, 8 S. 721). At the same time, cautioners who guarantee the faithful performance of the duties of an office are liable for all duties that come fairly within the scope of the office, and are not discharged by a modification in the position of the office, provided the duties of the office remain in substance the same as before (*Skillett*, 1867, L. R. 2 C. P. 469).

With regard to the effect upon the liability of cautioners of alterations in the original contract, a distinction is taken between the case of a guarantee of a future course of dealing, conceived in general and absolute terms, and the case of a guarantee of a particular and definite transaction or set of transactions. In the former class of cases, the Courts will not readily hold that slight alterations in the original contract between the principals as to the time or manner of payment, or as to the conditions of employment, have the effect of releasing cautioners (*Bowe & Christie*, 1868, 6 M. 642; *Stewart, Moir, & Muir*, 1871, 9 M. 763). In guarantees of this class, the cautioner will not, in short, be discharged by a variation in the contract, unless the variation is an unreasonable one, which materially prejudices the position of the accessary obligant (*Calder & Co.*, 1889, 17 R. 74; *Nicolsons*, 1882, 10 R. 121). On the other hand, where a guarantee is given for a particular and definite transaction, or where the original contract between the creditor and the principal debtor is explicitly made part of the cautioner's contract, all the conditions of the original engagement must be strictly adhered to, and any alteration, whether shown to be material or not, will discharge the cautioner, if made without his consent (*Stewart, Moir, & Muir*, 9 M. 1871, 763: see per L. J. C. Moncreiff, *Mills*, 1849, 3 Exch. 590; *General Steam Navigation Co.*, 1859, 6 C. B. (N. S.) 550; *Murray*, 1882, 9 R. 1040; *Bonar*, 1850, 7 Bell's App. 374). Of course, if the alteration in the contract between the principals is made with the knowledge and consent of the cautioner, or if, with full knowledge of all the facts, he subsequently assents to the alteration, he will not be discharged. But consent on the part of a cautioner to an alteration of the contract will not be implied from mere silence (*Allan, Buckley, Allan, & Milne*, 1893, 21 R. 195). Again, a cautioner for the good conduct of an employee is not discharged from liability under his guarantee, although his position has been altered by the conduct of the employer, when that conduct of the employer was brought about by a fraudulent act or omission on the part of the employee, against

which the cautioner has guaranteed the employer (*Mayor of Hull*, 1892, 2 Q. B. 495).

Discharge of the Cautioner by the Creditor "giving Time" to the Principal Debtor.—To "give time" means to extend the period at which, by the contract between them, the principal debtor was originally liable to pay the debt to the creditor, and to extend it by a new and valid contract between the creditor and the principal debtor, to which the cautioner does not assent. The injury to the cautioner, owing to such an extension of time to the principal debtor, may be real, or it may be merely theoretical; in either case, the cautioner is entitled to be freed from his obligation (see per L. Kinnear in *Johnstone*, 1893, 19 R. 624; *Strong*, 1855, 17 C. B. 201; *Scottish Provident Institution*, 1891, 8. L. R. 390). In determining whether time has been given, the essential point to settle is whether the period at which, by the contract between the parties, the principal debtor was originally liable to pay the creditor, has, in point of fact, been extended by a new agreement between them. Where the debt for which the cautioner intervened is payable on a definite date, there is not much difficulty in determining whether the date of payment has been postponed by the new agreement (*Croyden Commercial Gas Co.*, 1876, 1 C. P. D. 707; 1876, 2 C. P. D. 46; *Richardson*, 1853, 15 D. 628). On the other hand, in a guarantee for the price of goods to be sold in a course of future dealings, or of money to be advanced, in which no definite date of payment is mentioned, it is more difficult to determine whether, in virtue of a new agreement between the creditor and the principal debtor, there has been any actual postponement of the time of payment (see per L. P. Inglis in *Calder & Co.*, 1889, 17 R. 74, at 80; also per L. J. C. Moncreiff in *Stewart, Moir, & Mure*, 1871, 9 M. 763). In such a case the real question to be looked to is whether, under the new arrangement between the principals, the credit allowed to the debtor was unreasonable in the circumstances; and if the credit allowed is not in itself unreasonable, the guarantor will be held to have undertaken to guarantee the actual transactions as arranged between the parties (*Calder & Co.*, 1889, 17 R. 74; *Bowe & Christie*, 1868, 6 M. 642).

In order to constitute a giving of time so as to release the cautioner, there must be a positive contract by the creditor, by which his hands are tied. "In the language of the law, to give time does not consist in refraining from suing, but in the creditor putting himself under a disability to sue by agreeing to postpone payment of his debt" (per L. Rutherfurd Clark in *Hay & Kidd*, 1886, 13 R. 777). Mere forbearance or delay by the creditor in taking proceedings against the principal debtor will not release the cautioner (*Fleming*, 1824, 2 S. 296; *Morison*, 1849, 11 D. 653; *Brown*, 1860, 23 D. 363; *Creighton*, 1840, 1 Rob. App. 99), unless in the special case where the forbearance or delay is in contravention of an express or clearly implied undertaking of the creditor to the cautioner (*Lawrence*, 1862, 31 L. J. C. P. 143; *Bank of Ireland*, 1818, 6 Dow's App. 233). Again, in order to discharge a cautioner, the agreement with the debtor to give him an extension of time must be one that is legally binding on the creditor (*Philpot*, 1828, 4 Bing. 717; *Strong*, 17 C. B. 201). The agreement between the creditor and the principal debtor must involve an actual giving of time, that is, it must, as a matter of fact, tie up the creditor's hands so as to prevent him enforcing the debt (*Nicolsons*, 1882, 10 R. 121; see per L. P. Inglis at 127). Thus, if the creditor takes a bill or note from the debtor, the effect of this upon the cautioner's liability will depend upon whether the bill or note is merely taken as a collateral security or whether it postpones the right of action upon the debt (*Oriental Finance Co.*,

1874, L. R. 7 H. L. 348; *Price*, 1830, 10 B. & C. 578). A striking example of the difficulty which may arise in determining whether a certain transaction involves an actual giving of time, is found in the recent case *Rouse*, L. R. (1894) 2 Ch. 32, L. R. (1894) App. Ca. 586. The discharge of a cautioner resulting from a contract to give time, like every discharge resulting from a variation of the original contract, is an absolute discharge (see, *e.g.*, per Alderson, J., in *Coombe*, 1831, 8 Bing. 156, at 164), except in the special case where the contract between the creditor and principal debtor is clearly divisible (*Croydon Commercial Gas Co.*, 1876, L. R. 2 C. P. D. 46).

After the creditor has obtained decree against the cautioners, no subsequent dealings with the principal debtor in the way of giving him time will discharge the cautioners (*Aikman*, 1835, 14 S. 56; *Jenkins*, 1853, 2 Drew, 351). Of course, also, where a cautioner has consented either previously, contemporaneously, or subsequently, to the arrangement by which time is given to the principal debtor, he is not discharged (*Rouse* (1894), 2 Ch. 32); but the assent of the cautioner to an arrangement giving time will not, unless in special circumstances, be inferred from mere knowledge on his part, combined with silence (*Allan, Buckley, Allan, & Milne*, 1893, 21 R. 195). Again, a cautioner is not discharged by an agreement by the creditor to give time to the debtor, if in this agreement the creditor's remedies against the cautioner are expressly reserved; for such a reservation keeps alive the cautioner's right of relief against the principal debtor, so that he is in no way prejudiced by the agreement (*Crawford*, 1873, 1 R. 91: affd. 2 R. (H. L.) 148). But if the words reserving the cautioner's rights are merely idle, as where the essential effect of the new arrangement between the principals is to impair these rights, the cautioner will be discharged in spite of the clause reserving his right (*Bolton*, 1891, 1 Q. B. 278).

Cautioner is discharged by the Creditor releasing the Principal Debtor.— The cautioner is discharged if the creditor releases the principal debtor, or if the release of the principal debtor is the result of some act or omission on the part of the creditor (Bell, *Prin.* s. 260; *Wallace*, 1825, 3 S. 433). On principle, the extinction of the principal obligation necessarily involves the extinction of the accessory obligation; for there can be no guarantee of a principal obligation which has ceased to exist. Thus, if the creditor allows prescription to run on the principal obligation, the cautioner's obligation is extinguished equally with that of the principal debtor (*Halyburtons*, 1735, Mor. 2073). In order, however, that a release of the principal debtor by the act of the creditor shall discharge the cautioner, there must be an actual legal discharge of the debtor, and not a mere intention to release him (*Scholefield*, 1859, 28 L. J. Ch. 452). The creditor's release of the principal debtor will not operate the liberation of the cautioner, if the latter has consented to the release (*Fleming*, 1823, 2 S. 336). Again, in order that the release of the principal debtor may have the effect of liberating the cautioner, it must have been brought about by a voluntary act or contract on the part of the creditor, and not by the operation of law, as in bankruptcy (Bell, *Com.* i. 359 *et seq.*; *Whitelaw*, 20 May 1814, F. C.; Bankruptcy Act, 1856 (19 & 20 Vict. c. 79, s. 56)). Further, though the principal debtor is released by the voluntary act of the creditor, yet this will not liberate the cautioners, if the release was granted subject to the reservation of the creditor's remedies against the cautioners, so that it can be construed as allowing the cautioners to retain all their rights against the principal debtor (*Muir*, 1893, 1 R. 91; affd. 1895, 2 R. (H. L.) 148). Of course, where the principal debtor is absolutely discharged, so that the debt is

extinguished, the reservation of a right to proceed against the cautioners is necessarily idle and is treated as *pro non scripto* (*Nicolson*, 1836, 4 A. & E. 675; *Webb*, 1857, 3 K. & J. 438); and frequently there is difficulty in determining whether the discharge by the creditor amounts to an absolute discharge, or whether it amounts merely to a personal release of the debtor from action by the creditor (*Green*, 1869, 4 L. R. Ch. App. 204; *Cragoe*, 1873, L. R. 8 Ex. 81; *Bateson*, 1871, 7 L. R. C. P. 9).

Cautioner is discharged by the Creditor releasing a Co-Cautioner.—A discharge or release of one cautioner by the voluntary act of the creditor operates as a discharge of the other cautioners. The Scots law on this subject is now regulated by sec. 9 of the Mercantile Law Amendment Act: "After the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of the cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner"—probably creditor is meant—"consenting to the discharge of a co-cautioner who may have become bankrupt" (19 & 20 Viet. c. 60, s. 9). This section applies wherever the obligants are jointly and severally bound for the same debt, although their obligations are contained in separate writings; but it does not apply if the obligations of the several obligants are in their inception wholly separate (*Morgan*, 1879, 10 M. 614). Further, in order that a discharge granted to a co-obligant should have the effect of releasing the other obligants, it must amount to an unqualified discharge of the joint and several obligation, or (which is the same thing in legal effect) an agreement that the debtor shall not only be discharged in a question with his creditor, but shall also be discharged of his liability to contribute in a question with other co-obligants (per L. M'Laren in *Morton's Trs.*, 1892, 20 R. 72).

Cautioner is discharged by the Creditor giving up or losing Funds or Securities.—If the creditor has lost or relinquished any securities for the debt, or has permitted such securities to get into possession of the debtor, or has failed owing to negligence to make them effectual by completing his title, the cautioner is discharged to the extent of such securities (*Sligo*, 1840, 2 D. 1478, in which case this whole subject is fully discussed and the authorities reviewed). The creditor must hand over the securities in exactly the same position as they stood in his hands, and with the remedies on them unimpaired (*Fleming*, 1826, 2 W. & S. 277). Even where the loss of the securities is not due directly to the act of the creditor, but has occurred through the negligence of a factor or agent, the cautioner may be relieved to the extent of the loss (*Wright's Trs.*, 1835, 13 S. 380). At the same time, a mere depreciation in the value of securities held by the creditor for the debt, or even the fact that such securities have turned out utterly worthless, will not liberate the cautioner, unless it is shown that the loss was in some way attributable to the fault of the creditor (*Hardwick*, 1865, 35 Beav. 133). The discharge of a cautioner owing to securities being lost or given up by the creditor is, it is to be observed, different in its effect from the discharge of a cautioner owing to an alteration in the contract between the creditor and the principal debtor. In the former class of cases the cautioner is discharged only *pro tanto*, to the extent of the securities passed from: in the latter class of cases he is wholly discharged. Where one of several cautioners holds a separate security over the estate of the principal debtor, he must, in dealing with it, observe the same care on behalf of his co-cautioners as the creditor is

bound to observe on behalf of the whole body of the cautioners; and if he fail to do this, the co-cautioners are liberated to that extent, in a question with him (*Hume*, 1830, 8 S. 295).

Cautioner to or for a Firm is discharged as regards future Transactions by a Change in the Firm.—The effect of a change in a firm, to or for which a cautionary obligation has been undertaken, was first made the subject of statutory regulation in the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60, s. 7). This section, though repealed by sec. 48 of the Partnership Act, 1890 (53 & 54 Vict. c. 39, s. 48), was re-enacted in a more explicit and somewhat more emphatic form by sec. 18 of the same Statute (53 & 54 Vict. c. 39, s. 18), as follows: "A continuing guaranty or cautionary obligation given either to a firm, or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given." This statutory rule is merely declaratory of the principles reached both in Scotland and England at common law. A change in the firm, sufficient to put an end to the cautioner's liability so far as future transactions are concerned, may occur by the introduction of a new partner (*Spiers*, 1829, 3 W. & S. 392; *Bowie*, 1840, 2 D. 1061; *Montefiore*, 1863, 12 W. R. 83), or by the death or retirement of an old partner (*Elton, Hammond, & Co.*, 24 June 1812, F. C.; *Philip*, 21 Feb. 1809, F. C.; *University of Cambridge*, 1839, 5 M. & W. 580). In the case, however, of a large firm whose membership is constantly fluctuating, it is probable, in spite of the strict terms of the enactment, that "an agreement to the contrary" may still be implied, at least where the firm is in the position of creditor, so that a renewal of guarantees and bonds of caution is not necessary on every change in the firm (Bell, *Com.*, McL. ed., i. 387). It is usual and expedient, however, in all cases of continuing guarantees or cautionary obligations undertaken to a firm, to insert an express stipulation to the effect that no change in the firm shall discharge the cautioners. A change in a firm, sufficient to revoke a guarantee given to or for a firm may occur as well by a change in the constitution of the firm as through an alteration in the individual members of the firm (*Dance*, 1804, 1 B. & P. (N. R.) 34; but the registration of a company with limited liability, accompanied by a change in the name, is not such a change as will release cautioners (*Groux's Soap Co.*, 1860, 8 C. B. (N. S.) 800).

Cautionary Obligations, Septennial Limitation of.—*The Statute.*—The Act 1695, c. 5, "Anent Principals and Cautioners," enacts that, "Considering the great hurt and prejudice that hath befallen many persons and families, and ofttimes to their utter ruin and undoing, by men's facility to engage as cautioners for others, who afterwards failing have left a growing burden on their cautioners without relief; therefore and for remedy thereof, his Majesty, with advice foresaid, statutes and ordains that no man binding and engaging for hereafter, for and with another, conjunctly and severally, in any bonds or contracts for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond, but that from and after the said seven years the said cautioner shall be *eo ipso* free of his caution: and that whoever is bound for another, either as express cautioner or as principal, or as co-principal, shall be understood to be a cautioner to have the benefit of this Act; providing that he have either clause of relief in the bond, or a bond of relief apart,

intimate personally to the creditor at his receiving of the bond, without prejudice always to the true principal's being found in the whole contents of the bond or contract; as also of the said cautioners being still bound, conform to the terms of the bond, within the said seven years, as before the making of this Act; as also providing that what legal diligence, by inhibition, horning, arrestment, adjudication, or any other way, shall be done within the seven years, by creditors against their cautioners for what fell due in that time, shall stand good, and have its course and effect after the expiry of the seven years as if this Act had not been made."

Effect of the Statute.—The Statute does not deal merely with the mode of proving, or the legal means of enforcing, a contract; it operates a total extinction of the cautionary obligation after the lapse of seven years, in two cases: (1) Where the cautioner is bound in the same writing as the principal debtor, and by the form of the bond is bound expressly as cautioner; and (2) where he is bound as principal or co-principal, and is shown to be a cautioner by a clause of relief in the bond itself, or by a separate bond of relief intimated at its execution to the creditor. The clause of the Statute, "whoever is bound for another," etc., is introduced into it not by way of exception, but by way of express provision and addition (*Douglas, Heron, & Co.*, 1792, Mor. 11032; *Scott*, 1831, 5 W. & S. 436). After the expiry of the seven years the obligation is nullified and wiped out: the cautioner is free; and no claim can be made against him under the old contract (*Scott, ut supra*; *Tait*, 1840, 1 Rob. App. 137; *Stocks*, 1890, 17 R. 1122).

So absolute is the extinction of the obligation, that payment of interest made by a cautioner after the seven years will not continue it (*Scott, ut supra*); and where a cautioner, after the expiry of the septennium, had paid the principal sum to the creditor, he was held entitled to repetition, on the ground that there had been no obligation, natural or civil, upon him to pay (*Carrick*, 1778, Mor. 2931). Diligence done (*Irving*, 1752, Mor. 11043; *Reid*, 1780, Mor. 11043), or decree obtained (Bell, *Prin.* 603, *Com.* i. 376), against a cautioner within the seven years will deprive him of the benefit of the Statute, but will not render him liable for interest falling due after the prescriptive period (*Douglas, Heron, & Co.*, 1793, Mor. 11048; *Ewing*, 1739, 5 Bro. Supp. 211). No averments by the creditor that the cautioner "asked for time" or the like will afford a relevant answer to the plea of the limitation (*M'Gregor's Exrs.*, 1893, 21 R. 7); there must be an averment of something amounting to a renewal or corroboration of the original obligation (*Douglas, Heron, & Co.*, 1793, Mor. 11048; *Gordon*, 1715, Mor. 11037; *Wallace*, 1749, Mor. 11026), and it must be proved by writing (*M'Gregor's Exrs., ut supra*). It is probably a good answer to a plea of the limitation, that the cautioner is barred *personali exceptione* from that defence: but the averments on which the plea in bar rests must set forth that the cautioner has by his representations or conduct induced the other party to believe a certain state of facts to be true, and to alter his position by acting on that belief (*M'Gregor's Exrs., ut supra*).

Cases falling within the Statute.—Under the first case dealt with by the Statute, the use of the word "cautioner" is not essential to entitle the obligant to relief, if equivalent words be used. Where certain shareholders of a company bound themselves as individuals, "and by way of corroborative guarantee," for the repayment of a sum of money borrowed by the company, they were held to be cautioners, and as such entitled to the benefit of the Statute (*Stocks*, 1890, 17 R. 1122). It is enough if the character of the obligant be plainly that of one "binding and engaging for and with another" in a bond or contract, and a person bound as "full debtor" may be a

cautioner in the sense of the Statute (*Monteith*, 1841, 4 D. 161). But he only is a cautioner who is entitled to total relief (Bell, *Prin.* 601), and consequently the limitation was held not to apply to a bond in which two persons were bound as co-obligants with no clause of relief or back-bond, though one of them was known and admitted to be merely a cautioner (*Smith*, 1825, 1 W. & S. 315), nor to a case in which the obligant "guaranteed the payment of the sum in" a certain bond to the creditors therein (*Wilson*, 1840, 1 Rob. App. 137), for there the word "guarantee" amounted to a distinct and independent obligation to pay the sum due; nor to a case in which parties were bound as co-principals with mutual stipulations of relief (*Creditors of Park*, 1785, Mor. 11031). Nor, again, may the Statute be pleaded by one who accepts a bill as security for another acceptor (*Sharp*, 1808, Mor. *voce* Bill, App. 22).

Under the second case contemplated by the Statute, and where there is a separate bond of relief, mere private knowledge of that bond on the part of the creditor will not serve as a substitute for the personal intimation required by the Act (*Bell*, 1727, Mor. 11039). The intimation must be proved by writing, even if it need not be notarial or judicial (*Drysdale*, 1839, 1 D. 409). But the Statute was held not to apply where a creditor with his own hand wrote and signed as a witness a bond of relief granted by one co-obligant in a bond to another of even date with the original bond (*M'Rankin*, 1714, Mor. 11034). The bond of relief should be intimated to the creditor at his receiving of the bond, *i.e.* probably the principal bond; but, in any event, the years of limitation do not seem to begin to run till the date of intimation, "for it would be the hardest thing in the world if you were at the end of six years to convert a man into a cautioner" (*Scott*, 1831, 5 W. & S. 436, per L. C. Brougham).

Cases not falling within the Statute.—A large number of cautionary obligations have been held to be excepted from the Statute. Such are bonds of caution in any sort of judicial proceeding (*M'Kinlay*, 1781, Mor. 2154; *Hogg*, 1826, 4 S. 708), in a confirmation (*Gallie*, 1836, 14 S. 647), in a composition contract (*Cuthbertson*, 1823, 2 S. 292), under a marriage contract (*Stewart*, 1726, Mor. 11010), *ad factum præstandum* (*Robertson*, 1736, Mor. 11010; *Kincaid's Creditors*, 1741, Elchies, *Cautioner*, 11), or for the discharge of an office (*Bremner*, 1842, 1 Bell's App. 280). The limitation does not affect cases where the debt is not liquid (*Anderson*, 1821, 1 S. 31), nor *ex post facto* engagements to pay, or see paid, a sum already lent (*Caves*, 1742, Mor. 11020), nor cautionary obligations in a bond of relief (*Bruce*, 1793, Mor. 11033), or of corroboration (*Scot*, 1715, Mor. 11012), nor, it would seem, a cash-credit bond (*Alexander*, 1843, 6 D. 322), nor an action of relief by one cautioner against another (*Forbes*, 1726, Mor. 11014).

Such other cases as have been found to be outside the operation of the Statute may be grouped into three classes: (1) Cases in which every year a new obligation arises, *e.g.* caution for the payment of an annuity (*Balvaird*, 1709, Mor. 11005); (2) cases where the fulfilment of the obligation is postponed to an uncertain date which happens as a matter of fact to fall outside the septennium (*Borthwick*, 1715, Mor. 11008); and (3) cases where the fulfilment of the obligation is postponed till a fixed term beyond the septennium (*Millers*, 1762, Mor. 11027). In all three classes the test whether the Statute applies or not, is the liability of the cautioner, not of the principal, and no cautionary obligation, it would appear, will fall under the Statute in which there is not a definite sum of money prestable in full, and on which the creditor might not do diligence if occasion arose, at some time within the seven years. However repugnant such a limited construction may be to the

plain language of the enactment, it has long since passed into the common law ,and is now probably too firmly established to be overturned (see *Molleson*, 1892, 19 R. 581). But, while this was acknowledged by the Court in the case just cited, it was by a bare majority only of seven judges that the legal principle enunciated above was held to apply to a case where certain cautioners had bound themselves to pay the interest on a loan till the repayment of the principal, so as to deprive the cautioners, on the analogy of *Balvaird* (*ut supra*), of the benefit of the Statute. Had the cautioners in *Molleson* been bound for principal as well as interest, there is little room for doubt that the Statute would have applied.

Minority.—The years of a creditor's minority are not to be deducted in reckoning the period which has elapsed from the date of the obligation, no exception in favour of minors being contained in the Act (*Stewart*, 1712, Mor. 11151).

International Law.—As the limitation introduced by the Statute enters into the contract and forms part of it, the *lex loci contractus* will be given effect to in cases where questions of private international law arise. Thus the limitation will be held to apply when Scottish cautionary obligations are sued on in a foreign Court, but not when a foreign cautionary obligation is sued on in the Scots Courts, for no such limitation forms an implied term of the foreign contract (*Alexander*, 1843, 6 D. 322, where see L. Fullerton's exposition of the whole effect of the Statute).

[Ersk. *Inst.* iii. 7. 22. 24; Bell, *Prin.* 600–4; Bell, *Com.* i. 374; More *apud* Stair, Note P. i. cxv.–cxviii.; Napier on *Prescription*, 850–4; Millar on *Prescription*, 178–84].

Caution, Judicial.—1. *Caution in Suspensions, and Suspensions and Interdict.*—Every note of suspension must contain an offer to find caution or juratory caution, or to consign the money charged for, or a crave that, in the circumstances, caution be dispensed with. Frequently the note is alternative, containing an offer to find, and a crave to dispense with, caution (Mackay's *Manual*, 423). When the note is passed on caution or consignation, fourteen days from the presenting of the note are allowed, in which the suspender must find caution or consign (A. S. 11 July 1828, s. 12). If the question has been reserved, but ultimately caution is required, it must be found within fourteen days from the reading in the minute-book of the interlocutor passing the note. If the suspender fails to find caution within the appointed time, he may crave the Lord Ordinary on the Bills for a prorogation of time. This the Lord Ordinary may now grant unconditionally (see, however, A. S. 14 June 1799, s. 1). The bond of caution is obtained from the Clerk of the Bills, and the suspender's agent must get it signed by the cautioner or cautioners, and at the same time obtain from a magistrate or justice of the peace a certificate that the cautioner is habit and repute responsible for the obligation he undertakes (Mackay's *Manual*, 427). When the bond is lodged, notice must be sent to the respondent's agent, to enable him to state objections. The respondent may object to the sufficiency of the caution, or he may demand that the bond be attested. See Attestor.

Bond of Caution in Suspensions.

, bind and oblige heirs, executors, and successors , as cautioners and surety, acted in the Books of Council and Session, for . That , or to any other person to whom

shall be ordained to , as stated in a note of suspension between the said parties, presented on the day of eighteen hundred and years; and that in case it shall be found by the Lords of Council and Session that ought so to do, after discussing the passed note of suspension; and also, that payment shall be made of whatever sum the said Lords shall modify in name of damages and expenses in case of wrongous suspending. Consenting to the registration hereof in the Books of Council and Session, that letter of horning and all other execution may pass upon a decreet to be interponed hereto, in common form, and for that end constitute procurators.—In witness whereof, these presents, written by , clerk to *A. B.*, Clerk of the Bills, so far as not printed, are subscribed, etc. (*testing clause in usual style*). [When desired, forms can be obtained from the Bill Chamber Clerk.]

If the bond is satisfactory, it is lodged in the Bill Chamber offices, but it does not come into operation until the note is passed. If the objections are sustained, a new bond is issued and new cautioners obtained. If, however, either party is dissatisfied with the ruling of the clerk, he may apply to the Lord Ordinary on the Bills to have the ruling overturned. If the circumstances alter, the respondent may apply for new caution, in which case the original cautioner is freed.

The position of a cautioner in a suspension is different from an extra-judicial cautioner. The charger does not ask for caution, the suspender offers it; the charger is not called upon to interfere in the matter; hence a cautioner has been held bound, though he only agreed to be cautioner on the understanding that the bond was signed by a co-cautioner, who failed to sign (*Simpson*, 1860, 22 D. 679). Further, the septennial limitation does not apply to bonds in the Bill Chamber (Mackay's *Manual*, 429). Where the suspender abandons his case the cautioner is entitled to carry it on, and maintain the reasons of suspension, or propose others (per L. Craigie in *Eadie*, 1833, 11 S. 415): but if he fails to take it up, he is liable. The cautioner is liable for all the ordinary steps of process, but not for extraordinary steps, as where the suspender, without consulting the cautioner, placed the question before a referee (*Stewart*, 1843, 6 D. 151). Such action on the part of the suspender frees the cautioner; as does an application for new caution by the charger (*Eadie*, 1833, 11 S. 415).

If caution is not found when required by the Lord Ordinary, the note is refused, and a certificate of no caution is issued by the clerk. The charger will not obtain the certificate, unless he gives due intimation to the other side that he proposes to ask for it; and the clerk will not give out the certificate until twenty-four hours after such intimation (A. S., 24 Dec. 1838, s. 9). The complainer, after the certificate has been issued, may still have recourse to a note craving the Lord Ordinary to recall the certificate, and to allow him to proceed with his suspension (*Andrew*, 1853, 15 D. 482), but even this avenue is closed to him after the Lord Ordinary has issued an interlocutor finding him (the complainer) liable in expenses. The bill is out of Court, and the complainer cannot reclaim (*Purdie*, 1861, 24 D. 85). [See Mackay, *Manual*, 426–432.]

2. *Juratory Caution.*—A form of caution sometimes offered in suspensions, where the complainer depones on oath that he can find no better (Stair, iv. 52. 26). A complainer offering juratory caution must show to the Lord Ordinary a *probabilis causa litigandi* (*M'Gregor*, 1862, 24 D. 1006). Before such an application be granted, the complainer must depone, before a commission appointed by the Lord Ordinary, at a time and place to be previously intimated to the opposite party, whether he has "any lands in property or liferent, or bonds, bills, or contracts containing sums of money," and if so, what they are. He must lodge with the Clerk of

the Inferior Court—(1) the bond of caution; (2) a full inventory of his subjects and effects of every kind; (3) an enactment subjoined to the inventory, bearing that he will not dilapidate any of his property, and that he will not dispose of the same, or uplift any of the debts due to him, without consent of the respondent or his agent, or the authority of the judge, until the reasons of suspension be discussed, and till there be an opportunity of doing diligence for any expenses that may be ultimately found due. Further, the complainer shall lodge in the hands of the clerk the vouchers of any debts due to him, and the title-deeds of any heritable property belonging to him; and shall grant a special disposition to the respondent (if so required) of any heritable subject of which he may be possessed, and an assignation of all debts or other rights due to him for the respondent's security. The disposition, title-deeds, and vouchers remain in the hands of the clerk till the reasons of suspension be discussed (A. S. 28 July 1828, s. 3; *Sinclair*, 1892, 30 S. L. R. 55; *Livingstone*, 1890, 17 R. 702).—[Mackay, *Manual*, 430; Shand, *Practice*, i. 416, 447, 462.]

3. *Caution judicio sisti.*—This caution was required in order to free a debtor imprisoned under a *meditatione fugæ* warrant, but as such warrants have been in most cases abolished (43 & 44 Vict. c. 34; *Hart*, 1890, 28 S. L. R. 133), the exercise of this form of caution has proportionally lapsed. It has been defined as caution to abide judgment within the jurisdiction of the Court (Bell, *Prin.* s. 274). The cautioner agrees to produce the party in Court on such day as he may be cited (Ersk. i. 2. 19). He is freed by the death of the debtor (*Park*, 1680, 3 Bro. Supp. 318); by presenting the debtor at a diet of Court, and protesting that he has fulfilled his obligation (*Clark*, 1881, 9 R. 372); and by extract of the decree without requisition to present the debtor (*Stewart*, 8 July 1809, F. C.).

4. *Caution judicatum solvi.*—Caution to pay money or to implement a decree. This form of caution was always demanded in maritime causes (Ersk. i. 2. 19), until the passing of the Court of Session Act, 1850 (13 & 14 Vict. c. 36, s. 24), by which it was abolished in the Court of Session; and in the Sheriff Court it is not required from any party domiciled in Scotland unless the Sheriff shall require it on special grounds (1 & 2 Vict. c. 119, s. 22). The cautioner was liable for the whole amount found due by his principal; he was not limited to the amount awarded by the Admiralty Court, but for anything ultimately awarded by the Court of Session on a reduction of the Admiralty decree (*Miles*, 1797, Mor. 2063); and he was not liberated by the death of his principal (*Dundas*, 1743, Mor. 2038). He was liable for the whole debt, but had the benefit of discussion. It is still required in certain judicial proceedings, *e.g.* in loosing arrestments, recalling inhibitions, and in the Bill Chamber (Bell, *Com.*, 7th ed., i. 400, note (4); *M'Dougall's Trs.*, 1864, 3 M. 68).

Cautioner in Bail.—Caution to produce the accused when called upon, or to pay a specified sum. See BAIL.

5. *Cautio Usufructuaria.*—The caution given by a liferenter to the heir, that he will not abuse or injure the subject, and that it will be returned at the expiry of his liferent. This form of caution was introduced into Scotland by Act 1491, c. 25, which, not proving effectual, was confirmed by 1535, c. 15. Both these statutes were ratified by 1594, c. 230, entitled an Act "anent the upholding of the decayed landes within burgh." This last Act relates only to ruinous houses. The former Acts apply to liferenters holding by infeftment, to a liferent lease, to a donatar who has taken a gift of a liferenter's escheat (*Cuddel*, 1635, M. 8271). This caution is not now ordered as a matter of course (*Ralston*, 1803, Hume, 293; Rankine on *Landownership*,

3rd ed., 652); it is, however, the only remedy open to the fiar for controlling the liferenter's general management, for where waste has been already committed no action is competent to him who at the time holds the fee, for the damages are due to that person alone to whom the fee shall open after the liferenter's death (*Bell*, 1827, 6 S. 221).—[Ersk. ii. 9. 59; Stair, ii. 6. 4; Rankine on *Landownership*, 3rd ed., 651; Bell, *Prin.* 1064.]

6. *Caution for "Violent Profits."*—In an action of removing in the Sheriff-Court, if the defender desires to enter appearance, he must, unless he can show immediate reason why the action should be excluded, find caution for "violent profits," *i.e.* for the highest profits which could be made of the subjects of which the defender retains possesion, in case it should be found that he ought to have removed. Under the term is also included reparation for damages.—[Dove Wilson, *Sheriff Court Practice*, 4th ed., 477; Shand, *Practice*, i. 557.]

7. *Caution in Lawburrows.*—Lawburrows is an old form of process, whereby a person who fears bodily injury from another, forces the other to find caution not to trouble him. It is still in use, though rare. If the cautioner is called on to pay the penalty, one-half of it goes to the complainer, the other half to the public. The amount of caution is in the discretion of the Sheriff or Sheriff-Substitute, and if the party ordained to find caution fail to do so, he is liable to imprisonment for a period not exceeding six months (45 & 46 Vict. c. 42, s. 6). See LAWBURROWS.—[*The Justices' Digest*; Dove Wilson, *Sheriff Court Practice*, 444; *Jurid. Styles*, ii. 427.]

8. *Caution for Expenses.*—The ordaining of a party to an action to find caution for expenses is always a question for the discretion of the Court. Either pursuer or defender may be called upon to find caution, and in the event of failure the Court will give decree against the party so ordained (*Teulon*, 1885, 12 R. 1179). It may be asked for at any moment during the continuance of the action (*Gray*, 1884, 11 R. 1104). Consignation of a sum of money in the hands of the Clerk of Court has been accepted in lieu of caution (*Harvey*, 1870, 8 M. 971). When the Court grants *interim* execution for expenses, it is customary at the same time to find the successful party liable to repeat, if the judgment be reversed (48 Geo. III. c. 151, ss. 17, 18; see *Duke of Hamilton*, 1878, 5 R. 588; *Earl of Mansfield*, 2 March 1815, F. C.), but an exception to this rule was made in an action of nullity by a wife, where the husband appealed to the House of Lords, in which case the wife was awarded *interim* expenses without caution (A. B., 1884, 11 R. 1060).

When an appeal is taken to the House of Lords, security for costs is given by recognisance to the amount of £500 and a bond for £200. In lieu of the bond, payment may be made of £200 into the fee fund of the House of Lords, within one week after the presentation of the appeal to the House (Appellate Jurisdiction Act, 1876).

A. *By Pursuer.*—A bankrupt, whether voluntary (*Ritchie*, 1881, 8 R. 747) or statutory (*Horn*, 1872, 10 M. 295; *Mackersy*, 1850, 12 D. 1057) (but not a party made bankrupt under the Debtors Act, 1880—*Macrae*, 1889, 16 R. 476), is not permitted to sue an action relative to the estate of which he is divested, unless he finds caution or obtains the consent of his trustee (*Macdonald*, 1882, 9 R. 696; *Dunsmore's Trs.*, 1891, 19 R. 4). A bankrupt may, however, sue his trustee for payment of a balance alleged to be due to him (*Ritchie*, 1881, 8 R. 747); suspend diligence which has attached or may attach his person (*Young*, 1875, 2 R. 599).

The stringency of the rule which requires a bankrupt pursuer to find caution for expenses, is relaxed when his action is for vindication of

character. In this category are included an action of damages for slander, and also, it may be, assault and violent spoliation of property (*Thom*, 1888, 15 R. 780), but not mere illegal diligence against the estate (*Gray*, 1884, 21 S. L. R. 766). "It is for the discretion of the Court to say whether in particular circumstances the pursuer may be allowed to proceed with such an action without finding caution, but that discretion must be very carefully used, and leave is only to be granted in very exceptional circumstances" (*Clark*, 1884, 11 R. 418). Being a question of circumstances, no general rule can be laid down (*Scott*, 1885, 12 R. 1022), but if the slander complained of is not serious (*Brown*, 1895, 3 S. L. T. No. 63), or if there is any fact unfavourable to the *bona fides* of the action, such as long delay in raising it (*Collier*, 1884, 12 R. 47), or to pursuer's ultimate success (*Scott*, 1886, 13 R. 1173), caution will not be dispensed with. On the other hand, the general rule as to finding caution is read strictly, and none are held to fall under it except those who have actually been divested of their estate (Scott, *supra*). Poverty, or being in receipt of parochial relief (*Macdonald*, 1882, 9 R. 696), or partial divestiture, leaving the title to *acquirenda* untouched (*Bell*, 1862, 24 D. 603), do not bring a pursuer within it.

When there is divestiture, the patrimonial interest in the action belongs to the trustee, and he may sist himself as a pursuer, in which case no caution requires to be found (*Thom*, 1857, 19 D. 721); whether the injury complained of has been suffered prior to or subsequent to the date of sequestration, the damages recovered go to the trustee (*Jackson*, 1875, 3 R. 130). But it is doubtful if the trustee would, without the concurrence of the bankrupt, have a title to sue for a claim so personal as slander or assault (Jackson, *supra*; *Scott*, 1885, 12 R. 1022).

A bankrupt defender does not in any case require to find caution, or to get his trustee sisted along with him. It is not for the pursuer who has brought him into Court to complain, and if the bankrupt has, in the first instance, been unsuccessful and has reclaimed, he will certainly, where his character is attacked, be allowed to proceed, as in the Court below (*Buchanan*, 1880, 8 R. 220).

But though bankruptcy is a good ground for ordering caution, mere poverty is not in itself sufficient to induce the Court to ordain caution to be found (*Macdonald*, 1882, 9 R. 696; *Jenkins*, 1869, 7 M. 739). And whenever a bankrupt has received his discharge, and the trustee has also been discharged, the bankrupt may sue without caution (*Cooper*, 1893, 30 R. 920). If, however, the party is in receipt of parochial relief, his status is somewhat different, and a divergence of opinion has arisen between the First and Second Divisions. In *Hunter*, 1874 (1 R. 1154), the First Division held that a pauper must either take the benefit of the poor's roll or find caution: the Second Division have taken a different view, and have refused to lay down so general a proposition (*M'Donald*, 1882, 9 R. 696; *Johnstone*, 1890, 28 S. L. R. 141. A party on the poor's roll is in no case required to find caution (*Weepers*, 1859, 21 D. 305). In addition to bankrupts, the following parties must find caution:—(1) Pursuers in an *actio popularis*, who are mere men of straw put forward to screen others from liability for expenses (*Jenkins*, 1869, 7 M. 739, but see *Potter*, 1870, 8 M. 1064); (2) a married woman without separate estate, suing without her husband's express consent (*Teulon*, 1885, 12 R. 971); (3) the assignee of a bankrupt pursuer (*M'Ghie*, 1831, 10 S. 604); (4) a limited company suing without sufficient assets (*The Companies Act*, 1862, s. 69; *English Coasting and Shipping Co.*, 1886, 13 R. 430).

B. *Caution by Defender.*—A defender, even though insolvent or bankrupt, is not, as a rule, ordained to find caution (*Laurie*, 1888, 16 R. 62; *Hoggs*, 1882, 19 S. L. R. 452). It is, indeed, always a matter in the discretion of the Court (*Thom*, 1888, 15 R. 780); but there appear to be only three reported cases in which a defender has been ordained to find caution (*Richmond*, 1850, 12 D. 1017; *Stevenson*, 1886, 13 R. 913; *Allan*, 1879, 16 S. L. R. 592), and in each case the circumstances were very exceptional (Monteith Smith on *Expenses*, chap. ii. p. 24).

9. *Caution in Loosing Arrestments.* See ARRESTMENT.

10. *Caution by Judicial Factors and Curators Bonis.* See JUDICIAL FACTORS.

Caveat.—This is a document lodged at the proper office by a party who is apprehensive that legal proceedings may be taken against him, the object of which is to prevent any writ or warrant being issued, or any decree being pronounced, until he has had an opportunity of being heard. It is most frequently employed in Court of Session practice where there is reason to fear that suspension or suspension and interdict may be applied for; and, when lodged, it prevents a sist of execution or an award of interim interdict until an opportunity is given to the respondent to appear and object. When such proceedings are anticipated, a caveat may be lodged in the Bill Chamber in the following terms:—

> Should any application for suspension [*or* suspension and interdict] be presented at the instance of *A. B.* against *C. D.*, it is requested that notice be given to the subscriber before any order is pronounced thereon.
>
> [*Signed by C. D.'s Agent.*]
>
> [*Agent's Address and Date.*]

If any note is lodged thereafter, the Bill Chamber Clerk communicates with the Lord Ordinary, who appoints an early diet for hearing parties, and thereafter grants or refuses the interim remedy sought. A caveat in the Bill Chamber endures only for a month, but it may be renewed from time to time by the presenter calling at the office and dating it afresh. In the Sheriff Court a caveat lodged with the Sheriff Clerk will, in like manner, prevent any *ex parte* award. Caveats may be put up by any party interested in sequestrations for rent (Dove Wilson, *Sheriff Court Practice*, 491), the appointment of executors (Currie, *Confirmation of Executors*, 219, 314), the service of heirs (31 & 32 Vict. c. 101, s. 31), the issue of process caption, and, in general, in any application which may competently proceed *ex parte*, and will secure a hearing before any judicial deliverance is pronounced or warrant issued.

[See Mackay, *Practice*, ii. 174; *Manual*, 424; Dove Wilson, *Sheriff Court Practice*, 441.]

Caveat emptor (let the buyer beware) expresses a rule of the law of sale both in England and Scotland. It means that "in general, where an article is offered for sale and is open to the inspection of the purchaser, the [common] law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him" (Benjamin on *Sale*, 4th ed., 404). The law of England was established on this basis at an early date (*e.g. Chandeler*, 1603, Cro. Jac. 4; see also Fitzherbert's *Natura Brevium*, 1537, p. 94c), but, some time prior to 1778, the maxim was

doubted, and there was "a current opinion that a sound price was tantamount to a warranty of soundness" (per Grose, J., in *Parkinson*, 1802, 2 East, 314 at 321). The old rule was reaffirmed by Lord Mansfield in *Stuart*, 1778 (1 Doug. 18), and by the judgment in *Parkinson*, 1802 (*ubi sup.*), but it is now subject to so many exceptions that Lord Campbell declared in 1851 that they had "well-nigh eaten up the rule" (*Sims*, 17 Q. B., 281 at 291). The leading exceptions are embodied in sec. 14 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). The rule of *caveat emptor* had scarcely any place in the common law of Scotland,—the principle of that law being that "every man selling an article is bound, though nothing is said of the quality, to supply a good article without defect unless there are circumstances to show that an inferior article was agreed on" (per Hope, L. J.-C., in *Wheatley*, 1843, 5 D. 402 at 406). This was altered by the Mercantile Law Amendment Act (Scotland), 1856 (19 & 20 Vict. c. 60, s. 5), in a manner intended to produce assimilation to the law of England, but which in effect produced greater divergence. The section of the Act of 1856 was repealed by the Sale of Goods Act, 1893, and by the latter Act the law of Scotland and England is now completely assimilated. *Caveat emptor* was said to apply to warranty of title as well as to warranty of quality or fitness (per Parke, B., in *Morley*, 1849, 3 Ex. 500 at 510), but this is no longer law (Sale of Goods Act, 1893, s. 12). See SALE OF GOODS.

Cemetery.—See BURYING-PLACE.

Certificate of Judgment: Sheriff Court.—By the Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), provision is made for rendering judgments obtained in the Sheriff Courts of Scotland, for any debt, damages, or costs, effectual in any other part of the United Kingdom. Where such a judgment has been obtained, and the party holding it desires to have it enforced in England or Ireland, he gets from the Sheriff Clerk, on proving to him that the judgment has not been satisfied, and provided that a year has not elapsed from the date of the judgment, a certificate detailing the nature of the judgment. This certificate will be granted only if the time for appealing the judgment has elapsed, or, if appeal having the effect of staying execution has been taken, after such appeal has been disposed of. Registration of this certificate by the registrar or other proper officer of a County Court, or of the City of London Court, in England, or of a Civil Bill Court in Ireland, gives the certificate the effect of a judgment of the Court in which it is registered, and execution may be done thereon against such goods and chattels of the person decerned against as are within the jurisdiction of such Court (45 & 46 Vict. c. 31). See DECREE (SHERIFF COURT), EXECUTION OF: JUDGMENTS EXTENSION ACTS.

Certificate of Registry of Ship.—A certificate of registry is one of the papers necessary for the navigation of every British ship. Its issue and contents are regulated by the Merchant Shipping Act, 1894 (58 & 59 Vict. c. 60, ss. 14–23). It is granted by the registrar, and must enumerate all the particulars of the ship entered in the register, *i.e.*—(1) her name and port; (2) details of her surveyor's certificate: (3) the

particulars respecting her origin stated in the declaration of ownership; (4) the names, descriptions, and shares of her registered owners, together with (5) the name of her master (ss. 11, 14). The certificate may be used only for the lawful navigation of the ship, and must on no account be withheld from the master. Any person detaining it is liable to a fine not exceeding £100 (s. 15). If the master uses a false certificate he is guilty of a misdemeanour, and the ship is liable to forfeiture.

By sec. 17 and sec. 18, provision is made for the exchange of the old certificate for a new one, and for the substitution of a new certificate in lieu of one which has been lost. A provisional certificate will be issued, in the event of loss, by the local registrar or consular officer when the loss occurs at a port other than that of the ship's registry. Changes of master are endorsed upon the certificate—(*a*) where the change is made by sentence of a naval Court, by the officer of that Court; (*b*) where made in consequence of removal by a Court, by the proper officer of the Court; (*c*) where made for any other cause, by the registrar or British consular officer at the port where the change occurs; and the official so endorsing shall forthwith report the change to the Registrar-General of Shipping and Seamen. No one whose name is not endorsed on the certificate is free to act as master (s. 19). Change of ownership also must be endorsed on the certificate, which the master is required to deliver up for the purpose to the registrar of the ship's port of registry, or to the local registrar (s. 20). When a ship is lost by peril of the sea, or capture, or sale to a person disqualified to hold British ships, every owner is obliged to give notice to the registrar at her port of registry, and the captain is bound, under a penalty, to deliver up the certificate if in his possession (s. 21). If a ship at a foreign port becomes the property of persons qualified to own British ships, the consular officer there may grant the master, on application, a provisional certificate stating—(1) her name; (2) time and place of purchase, and name of purchasers; (3) name of master; (4) best possible description of her tonnage, build, etc., and shall forward a copy of the certificate at the first convenient opportunity to the Registrar-General of Shipping and Seamen. This certificate is good till the expiration of six months, or until the ship arrive at the port having a registrar, whichever any of these events first may happen (s. 22).

Temporary passes in lieu of certificates may be granted in special circumstances by the Commissioner of Customs or the Governor of a British possession (s. 25).

Certification.—All summonses contain a sanction, either express or implied, styled the certification of the summons, which is the penalty to be inflicted on the defender, if he shall neither comply with the will of the summons nor show a reason why he is not bound by law to comply with it. It is so called, because it certifies what the judge is to do if the defender refuse obedience to the will or command of the summons. By an old Act, the defender's contumacy was punished by the forfeiture of his lands and goods to the king, or by outlawry; nowadays, if the defender does not appear, judgment is pronounced in terms of the conclusions of the summons (Ersk. iv. 1. 7; Stair, iv. 3. 27–31). If, however, the defender desires to do so, he may be reponed against a decree in absence. (See Reponing.) There is a special certification, established by custom, against pursuers who neglect to prosecute a case after having commenced it: the defender may take protestation against the pursuer for not insisting; when

the protestation is admitted by the judge, the action falls, though the pursuer does not thereby lose his right of bringing a new action upon the same grounds. See Absence, Decree in; Protestation.

Certification contra non producta.—Formerly a decree of certification in an action of reduction improbation was difficult to reduce, even though pronounced in absence, the reason being, according to Stair, that this certification was "the most common and greatest security of all rights by infeftment," and much more effectual than a declaration of right (Stair, iv. 20. 6). If the defender failed to appear, the Lord Ordinary continued the cause for a week, and appointed it again to be enrolled; if the defender was still absent, decree of certification *contra non producta* was pronounced, but this decree could not be extracted for four weeks (Shand, *Practice*, 640). Now, however, such decrees may be set aside in the same manner as any other decree in absence (Mackay, *Practice*, ii. 163; *Manual*, 416). If the defender enters appearance, two terms are assigned to him for production, on expiry of which an order will be pronounced by the Lord Ordinary to produce the writings within ten days; if not then produced, decree of certification will then be pronounced. This decree is a decree *in foro*. The defender may reclaim within twenty-one days, and if the documents are then produced, he may be reponed on payment of expenses (Shand, *Practice*, pp. 641, 642; Ersk. iv. 1. 21). See Reduction; Reduction Improbation.

Certification pro confesso.—Where probation is by reference to oath, the interlocutor ordering parties to depone contains a certification, express or implied, that if they fail to appear they will be held as confessed: *i.e.* the law will presume that they are conscious of the truth of the matter referred to oath. But effect will not be given to this certification unless the party has been personally cited, if in Scotland, or by edictal citation if furth of the kingdom or if he has no fixed residence. The party will be restored against the certification by showing good cause why he failed to appear, and by paying expenses.—[See Stair, iv. 3. 31, iv. 44. 21; Ersk. iv. 2. 17; Dickson, *Evidence*, ss. 1529–33]. See Oath; Reference to Oath.

Certification: Sheriff Court.—"Under certification of being held as confessed" is the expression used in the warrant of a petition to warn the defender that if he does not enter appearance within the inducie of citation, decree will be given against him. See Appearance, Entering; Sheriff Court.

Certified Copy Interlocutor.—A copy of the interlocutor, signed by the clerk or assistant, is now equivalent to an extract. See Interlocutor, Extract.

Cess.—See Land Tax.

Cessio bonorum.—The process of *cessio bonorum* was introduced into Scotland to mitigate the harshness of the law of imprisonment for debt, under which a debtor could be imprisoned for an indefinite period failing payment of his debts in full. On condition of making a full disclosure and complete surrender of his existing estate and effects, herit-

able and moveable, under a process of *cessio bonorum*, the debtor obtained liberation from imprisonment and protection from personal diligence in respect of all debts then due by him. He remained liable as before, however, for the full amount of these debts, there being no provision for his obtaining a discharge. Under the changes in the law introduced by the Debtors Act, 1880, the process of *cessio bonorum* has practically lost its original character, and become a minor form of process for the distribution of bankrupt estates, the procedure being mainly regulated by the Act of 1880, and by the Act of Sederunt anent Cessios, of 22nd December 1882, passed in virtue of the powers in that behalf conferred on the Court by the Act of 1880. It is accordingly proposed to advert only very briefly to the features of the process of cessio under the older law. (For a full exposition of the subject, reference may be made to Bell, *Com.* ii. 470 *et seq.*)

Cessio bonorum was in its leading principles adopted from the civil law, which summed up the doctrine on the subject in the following words:—"Qui bonis cesserint nisi solidum creditor receperit, non sunt liberati. In eo enim tantummodo hoc beneficium eis prodest, ne judicati detrahantur in carcerem" (*Cod.* lib. 7, tit. 71, 1, 4). The institution was adopted by various European nations, including France, from which many of the features of the system as established in Scotland were probably borrowed. It was at first, both in Scotland and in France, accompanied by provisions for giving a humiliating publicity to the bankrupt's insolvent condition, which served the purpose of notifying the fact to those who might have dealings with him, and of acting by way of deterrent to others. Thus, in 1605, it was ordained that bankrupts or "dyvours" should buy and wear a special yellow bonnet (afterwards by Act of Sederunt of 1669, expanded into an entire habit of the same colour), and should sit attired in the same during a market day of ten hours upon a pillory provided for the purpose by the magistrates near the market cross. In 1688, the rule of the dyvours' habit was dispensed with in cases where innocent misfortune was libelled and proved in the process of cessio as the cause of the insolvency; but it was not finally abolished until the Cessio Act of 1836 (6 & 7 Will. IV. c. 56). This Act, as modified in some of its provisions by the Sheriff Court Act of 1876 (39 & 40 Vict. c. 70), regulated the procedure in cessio, down to the passing of the Debtors Act, 1880. The only provisions of the Acts of 1836 and 1876, and relative Acts of Sederunt, which now remain in force for practical purposes in processes of cessio are (1) those relating to procedure under debtors' petitions, prior to the first deliverance of the Sheriff; and (2) those which provide for appeals. (Goudy on *Bankruptcy*, 473, see *infra*.) Jurisdiction in cessio formerly belonged exclusively to the Court of Session; it was by 6 & 7 Will. IV. c. 56, extended to the Sheriff Court, and under 39 & 40 Vict. c. 70, jurisdiction was (as it now is) confined to the Sheriff Court as the Court of first instance. Under the former law, the right to apply for cessio was competent only to a debtor who had for at least one month undergone imprisonment for civil debt. By the Act 39 and 40 Vict. c. 70, s. 26 (2), the right was given to any debtor who was insolvent and under charge to pay any civil debt on which imprisonment might follow, or against whom a decree for payment of civil debt, not requiring a charge, had been granted, on which imprisonment might follow. Provision was also made by the same Act for interim protection, or liberation of the debtor. Decree of cessio operated (as now) as an assignation to the trustee mentioned therein of the debtor's moveable estate, excluding *acquirenda* (6 & 7 Will. IV. c. 56, s. 16), and it was optional to the creditors to require a disposition *omnium bonorum*. Upon decree of cessio being granted,

the debtor obtained protection from personal diligence, and liberation if in prison, as regards all existing debts due by him. His estate remained liable as before, however, for payment of these debts, there being no provision for discharge at common law or under the Cessio Acts; and until these debts were fully satisfied all estate acquired by him was open to diligence at the instance of his unpaid creditors (see *Reid*, 1894, 21 R. 935).

Cessio under the Debtors Act, 1880.

The utility of cessio as a means of obtaining relief from imprisonment for debt practically ceased upon the abolition of imprisonment in the case of all ordinary debtors by the Debtors Act, 1880 (43 & 44 Viet. c. 34). The only classes of debtors now subject to imprisonment for debt, under that Act, as amended by 45 & 46 Viet. c. 42, are (1) debtors for "taxes, fines, or penalties, due to Her Majesty," and (2) debtors for "rates and assessments lawfully imposed or to be imposed." With regard to debtors in the first class, the competency of cessio does not seem to have been ever clearly established (see 6 & 7 Will. IV. c. 56, s. 2; *Law*, 1795, Mor. 11,798; *Lawson*, 1853, 15 D. 392). With regard to debtors in the second class, the statutory restriction of the term of imprisonment to which they may be subjected (45 & 46 Viet. c. 42 s. 5), makes cessio a remedy unlikely to be often resorted to for the purpose of obtaining relief from personal diligence.

Under the provisions of the Debtors Act, the process of cessio has been practically converted into a minor process for the distribution of bankrupt estates, analogous in its leading features to sequestration, and appropriate to estates of small amount, where the process of administration and distribution is comparatively simple, and the more elaborate machinery of sequestration is uncalled for. It was by the Statute made competent for creditors to initiate the process, and provision was made for the debtor obtaining discharge of his debts.

I. *Petitioning for Cessio.*—A petition for cessio may be presented by "any debtor who is notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, or of this Act," or by "any creditor of a debtor who is notour bankrupt" within said meaning (43 & 44 Viet. c. 34, ss. 7, 8). There is no provision for winding up the estates of deceased debtors by cessio. The petition is competent only in the Sheriff Court of the county in which the debtor has his "ordinary domicile" (*ib.*; see *Hamilton*, 1852, 14 D. 844); and the jurisdiction of the Sheriff extends over all the creditors, although outwith the county or abroad (*Kennedy*, 1838, 16 S. 990). As to the requirement of notour bankruptcy, reference may be made to the article on Bankruptcy regarding the various modes in which that status may be constituted. The most common form in which evidence of notour bankruptcy is tendered is (under 43 & 44 Viet. c. 34, s. 6) by production of a duly executed charge for payment, which has been followed by the expiry of the days of charge without payment, or, where a charge is not necessary or not competent, by production of the extracted decree for payment, which has been followed by the lapse of the days intervening prior to execution without payment having been made. In such circumstances there is *primâ facie* evidence of insolvency in the sense contemplated by the Act, and consequently of notour bankruptcy (*M'Nab*, 1889, 16 R. 610; *Tennan*, 1886, 13 R. 833; *Aitken*, 1890, 28 S. L. R. 115). The presumption of insolvency may, however, be rebutted (*Fleming*, 1884, 21 S. L. R. 164, 9 App. Ca. 966; *Aitken, supra*; *Tennan, supra*; *Knowles*, 1865, 3 M. 457; Bell, *Com.* ii. 159, 286). Unlike a petition for sequestration, a petition for cessio does not

require to be presented within any definite period after the constitution of notour bankruptcy, and is competent at any time so long as the debtor continues in that state.

Where the debtor himself applies for cessio, the Debtors Act provides (s. 7) that he "may present a petition for decree of *cessio bonorum* in the same manner and subject to the same provisions and conditions, as nearly as may be, in and subject to which a person now entitled to apply for decree of *cessio bonorum* may do so under the Acts of Parliament enumerated in the schedule hereto annexed, hereinafter called the Cessio Acts [6 & 7 Will. IV. c. 56; 39 & 40 Vict. c. 70, s. 26], and the provisions of the Cessio Acts shall apply, as nearly as may be, to such petition and the procedure thereunder, subject to the provisions hereinafter contained." The petition (of which a form is subjoined) is framed in the manner prescribed by the Sheriff Court Act, 1876 (39 & 40 Vict. c. 70; Lees, *Handbook of Sheriff Court Styles*; see *M'Dermott*, 1876, 4 R. 217; *Crozier*, 1878, 5 R. 936). It sets forth that the debtor is notour bankrupt (43 & 44 Vict. c. 34, s. 7), and is prepared to surrender his whole means and estate to his creditors, and prays for decree of cessio, and for *interim* liberation or protection from imprisonment, if the debtor be subject to imprisonment. It must contain a list of all the creditors, with their names and designations and places of residence, so far as known to the debtor (6 & 7 Will. IV. c. 56, s. 3). There must be produced along with the petition evidence of the debtor's notour bankruptcy.

No fee-fund dues or other dues of Court are exigible in respect of cessio proceedings (43 & 44 Vict. c. 34, s. 11).

Where the petition for cessio is at the instance of a creditor, the procedure under the petition is regulated entirely by the provisions of the Debtors Act, 1880, and the Act of Sederunt anent processes of cessio of 22 Dec. 1882. A form of petition is subjoined. Any creditor may petition, irrespective of the amount of his claim. It is a question, however, whether the application can be founded on a debt which is not liquid. The Act contains no special provision on the subject, and permits "any creditor of a debtor who is notour bankrupt" to apply. The Act of Sederunt (s. 1) requires that the notice thereby prescribed of intention to present the petition "shall indicate the amount of the creditor's claim either by reference to the charge or by stating the sum or sums due." (See Goudy on *Bankruptcy*, 475, for opinion that the debt must be a liquid one presently due, and not future or contingent.)

Before presenting the petition, the creditor must give notice to the debtor of his intention to do so, at least six days and not more than fourteen days previously (Act of Sederunt, 1882, s. 1). The provision of the Act of Sederunt is as follows:—

"(1) In cases of cessio where a creditor is the petitioner, notice of the intention to present the petition on a day specified (failing payment of the creditor's claim), shall, at least six days, and not more than fourteen days before the presentation thereof, be given to the debtor by the creditor, his agent, or a messenger-at-arms, or sheriff-officer. Such notice may be posted in a registered letter to the known address of the debtor, in which case the six days and fourteen days respectively shall be reckoned from twenty-four hours after the date of posting, or it may be subjoined to, or given along with, a charge for payment of the debt. The notice shall indicate the amount of the creditor's claim, either by reference to the charge or by stating the sum or sums due. There shall be produced with the petition a certificate of the posting or delivery of the notice signed by the person

who gave the same, and, in the case of posting, the post-office receipt, failing which the petition shall not be entertained."

The object of the notice is to give an opportunity to the debtor, upon the petition being presented, of stating any objection he may be in a position to urge against the issuing of the first warrant, which orders publication of the petition, and is not subject to appeal (see *Adam*, 1883, 10 R. 670, per L. P. Inglis). He may appear in Court to do so personally or by an agent.

Along with the petition when presented, there must be produced (1) the certificate of posting or delivery, and post-office receipt (in case of posting) required by the Act of Sederunt (*supra*); and (2) evidence of the debtor's notour bankruptcy (see *supra*). Neither the Statute nor Act of Sederunt requires the creditor to produce an affidavit or vouchers in evidence of his claim.

The procedure which ensues upon the presentation of the petition is in practice the same whether the petition be at the instance of a creditor or of the debtor himself. The provisions of sec. 9 of the Debtors Act, 1880, on the subject are, by the terms of the rubric, applicable only to the case of a petition at the instance of a creditor, but in practice no distinction is made between the two classes of petition. (See Goudy on *Bankruptcy*, 473, and *Smith*, 1884, 12 R. 58.)

"(1) The Sheriff, if he is satisfied that there is *primâ facie* evidence of notour bankruptcy, shall issue a warrant appointing the petitioner to publish a notice in the *Edinburgh Gazette*, intimating that such petition has been presented, and requiring all the creditors to appear in Court on a certain day, being not less than thirty days from the date of the *Gazette* notice, the petitioner being bound, within five days after the date of such notice, to send letters to all the creditors specified in the petition, containing a copy of the said notice, and the Sheriff shall further ordain the debtor to appear on the day so appointed for the compearance of the creditors in the presence of the Sheriff for public examination; and the debtor shall, on or before the sixth lawful day prior to the day so appointed, lodge, to be patent to all concerned, a state of his affairs, subscribed by himself, and all his books, papers, and documents relating to his affairs, in the hands of the Sheriff Clerk; and the petitioner shall, on or before the same date, lodge in the hands of the Sheriff Clerk a copy of the said *Gazette*, and a certificate subscribed by his agent, or by a messenger-at-arms, or sheriff-officer, and a witness, stating the date and the place where the letters to the creditors were put into the post-office, and that they were severally addressed as specified in the petition" (43 & 44 Vict. c. 34, s. 9 (1)).

The warrant so issued by the Sheriff is not subject to appeal (*Adam*, 1883, 10 R. 670).

If the debtor disputes his notour bankruptcy or the jurisdiction of the Sheriff, a preliminary proof may be allowed (see Bell, *Com.*, 5th ed., 326; *Hamilton*, 1852, 14 D. 844). As to the case of an appeal against a decree upon which the debtor has been charged, see *Fleming*, 1883, 21 S. L. R. 164 and (H. L.) 722.

There is no special provision as to the mode of sending the required letters to creditors. The usual course is to send post-paid letters to each of the creditors personally. Prior to the Debtors Act, it was optional either to send letters to the creditors or to cite them in terms of law: it being sufficient in the case of a creditor furth of Scotland that the notice was given to his known agent or mandatory in Scotland (6 & 7 Will. IV. c. 56, s. 4; A. of S. 1839, s. 2; 39 & 40 Vict. c. 70, s. 26 (5)).

It is competent to the Sheriff to appoint any diet of compearance, or any meeting or proceeding under the Cessio Acts, to be held on an *induciæ* of any number of days, not being less than eight (44 & 45 Vict. c. 22, s. 12).

Should the debtor wilfully fail to lodge the state of affairs and his books, papers, and documents, in terms of the provisions of the Statute above quoted, he is liable to be punished for contempt of Court (see *Smith*, 1884, 12 R. 58).

There is no provision for the case of the petitioning creditor dying or withdrawing prior to decree of cessio being granted, similar to the provision contained in the Bankruptcy Act of 1856 with regard to petitions for sequestration (see *Meikle*, 1884, 11 R. 867).

The Sheriff is empowered, by section 12 of the Debtors Act, "upon cause shown by any creditor, or without any application if he shall think fit, at any time after the presentation of a petition for cessio, to grant warrant to take possession of and put under safe custody any bank notes, money, bonds, bills, cheques, or drafts, or other moveable property belonging to or in the possession of the debtor; and, if necessary for that purpose, to open lockfast places and to search the dwelling-house and person of the debtor." The word "dwelling-house" here includes shop, counting-house, warehouse, or other premises (44 & 45 Vict. c. 22, s. 13).

II. *Procedure at First Meeting.*—On the day appointed in the Sheriff's warrant, issued as above mentioned, the debtor and creditors compear before the Sheriff. The procedure at the meeting embraces (1) the hearing and disposal by the Sheriff of any objections to the granting of the cessio; (2) the public examination of the bankrupt regarding his affairs; and (3) the granting of decree of cessio, including the appointment of a trustee.

(1) *Objections to the Petition* may be stated either by the debtor or by any creditor, or by an agent for a creditor who should produce a mandate or at least the letter or citation received by the creditor whom he represents (A. of S. 1839, s. 18). Objections to the regularity of the proceedings founded not on radical defects, such as absence of notour bankruptcy, but on mere errors in procedure, are not necessarily fatal to the petition. Under the law prior to 1880, the Sheriff had a discretion to allow such errors to be rectified, and probably it would be held that he possesses similar power in proceedings under the Debtors Act, seeing that, as cessio has no retroactive effect on diligence, no prejudice in the ordinary case could be qualified. In practice, authority is not uncommonly given to rectify such errors of procedure. As the Sheriff has a discretionary power in awarding cessio or refusing it, it is competent to state objections founded on inexpediency, contrary to the rule in sequestrations where the Court possesses no such discretion. Thus it may be objected by a creditor that a debtor's application is in the circumstances an abuse of the process. Such an objection was given effect to in a case where a debtor stated that he had no estate of any kind, and it appeared that his only object in applying for cessio was to free himself from an existing debt (*Ross*, 1885, 13 R. 207). Again, where a debtor stated his assets at £15, and the creditors all united in opposing the application, cessio was refused (*Reid*, 1890, 17 R. 757). The absence of substantial assets, however, is not necessarily a ground for refusing cessio (*Sproul*, 1892, 19 R. 539). As a rule, objections founded on alleged inexpediency will not be given effect to (*Manson*, 1844, 7 D. 159; *Russell*, 1860, 22 D. 754). A subsisting cessio does not seem to prevent a new award, since cessio does not carry *acquirenda*. A subsisting sequestra-

tion, which does carry *acquirenda*, will form a bar to cessio (*Huyssens*, 1884, 11 R. 471, 21 S. L. R. 324).

(2) *The Examination of the Bankrupt* is conducted in a similar manner to an examination in sequestration. It precedes, however, the appointment of the trustee, which is only made when the Sheriff pronounces the decree of cessio. The Sheriff is empowered to put the debtor on oath or affirmation, as the case may be, and the debtor is bound to answer all pertinent questions put to him by the Sheriff, or by any creditor with the approbation of the Sheriff (43 & 44 Vict. c. 34, s. 9 (2)). The Sheriff may adjourn the examination for such time as appears to him fit and reasonable (*ib.*). The provisions of sec. 93 of the Bankruptcy Act, 1856 (19 & 20 Vict. c. 79), apply, as nearly as may be, to examination of debtors in cessio, and the production of books, deeds, or other documents by them (*ib.*). It is competent for the Sheriff, for the purpose of securing the attendance and examination of the debtor, or of any person who can give information relative to the debtor's estate, to exercise all the powers and to grant the warrants and commissions which in sequestrations he is empowered to exercise or grant under the 88th, 90th, and 91st sections of the Bankruptcy (Scotland) Act, 1856 (44 & 45 Vict. c. 22, s. 10). Thus he may grant warrant to apprehend the bankrupt or bring him from prison for examination, or to apprehend third parties who refuse or neglect to attend for examination, or to examine them on commission, or may order the production of books, deeds, or other documents, and cause the same or copies thereof to be delivered to the trustee (19 & 20 Vict. c. 79, ss. 88, 90, 91).

(3) *Award of Cessio and Appointment of the Trustee.*—After the examination of the debtor has been taken, the Sheriff is required by the Statute to grant a proof to parties, if that shall appear necessary, and hear parties, and either grant decree, decerning the debtor to execute a disposition *omnium bonorum* to a trustee for behoof of his creditors, or refuse the same *hoc statu*, or make such order as the justice of the case requires (43 & 44 Vict. c. 34, s. 9 (3)). The trustee is nominated by the Sheriff on the suggestion of the creditors represented at the meeting, and if they do not agree on a person the Sheriff makes his own selection (*ib.*). (As to the appointment of a new trustee, see *infra* IV.). If, from there being no funds belonging to the debtor, or from any other cause, it is found that no one will accept and act as trustee in a cessio, it is competent to the Sheriff, on the motion of the debtor, to recall the order on the debtor to grant a disposition *omnium bonorum*, if such has been pronounced, and to dismiss the petition with or without expenses (A. of S. 1882, s. 17).

The Sheriff's judgment granting or refusing cessio may be appealed to the Court of Session (*Galbraith*, 1856, 19 D. 136; *Adam*, 1883, 10 R. 670; *Reid*, 1890, 17 R. 757; *Simpson*, 1888, 16 R. 131; *Calderhead*, 1890, 17 R. 1098).

As mentioned above, the Sheriff has a discretionary power in granting or refusing decrees of cessio (see *supra* (1). Further, he is entitled, in granting decree, to attach conditions which may be reasonable in the circumstances. Thus, where the petitioning debtor was a clergyman whose stipend amounted to £100 and debts to £1100, he was found entitled to the benefit of cessio on condition of his assigning £20 annually out of his stipend to the trustee for behoof of his creditors (*Simpson*, 1888, 16 R. 131; see *Scott*, 1 Sh. App. 363). Similarly, where a debtor had a nett income from salary and commission of £90, and his debts amounted to £270, he obtained decree of cessio on condition of assigning to his creditors £20 per annum out of his earnings (*Calderhead*, 1890, 17 R. 1098).

The Sheriff may, in the debtor's absence, pronounce decree of cessio, "if the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and if the Sheriff shall be satisfied that such failure is wilful" (44 & 45 Vict. c. 22, s. 9; *Smith*, 1884, 12 R. 58; *Reid*, 1889, 16 R. 751; *Mackenzie*, 1891, 18 R. 925). This provision applies equally whether the petition be at the instance of the debtor himself or a creditor, although in the former case there is no "citation" of the debtor to attend the first meeting in accordance with the literal requirement of the Act (*Smith, supra*). The Sheriff's interlocutor should properly bear that he is satisfied that the failure to appear is wilful, although this has not been decided to be absolutely essential to its validity (*Reid, supra*; *Mackenzie, supra*). Where an interlocutor bore that decree of cessio was granted, "in respect the debtor has failed to appear at this diet for examination as ordered by the last interlocutor, and has not taken means to satisfy the Sheriff-Substitute that his absence was not wilful," the Court reduced the decree, in respect the Sheriff-Substitute had set forth a reason other than that he was satisfied that the debtor's absence was wilful (*Mackenzie, supra*).

Where the liabilities of the debtor exceed £200, the Sheriff has a discretionary power to award sequestration. Section 11 of 44 & 45 Vict. c. 22, provides: "If, in any proceedings under the Cessio Acts, where the liabilities of the debtor exceed the sum of two hundred pounds, it shall appear to the Sheriff that it is expedient, having regard to the value of the debtor's estate and the whole circumstances of the case, that the distribution of the estate should take place under the provisions of the Bankruptcy Acts, he shall have power forthwith to award sequestration of the estates which then belong or shall thereafter belong to the debtor before the date of the discharge, and declare the estates to belong to the creditors for the purposes of the Bankruptcy Acts, and thereupon the provisions of the said Acts shall apply as if sequestration had been awarded upon a petition for sequestration, in terms of sec. 29 of the Bankruptcy (Scotland) Act, 1856." The date of the award of sequestration by the Sheriff in such a case is the date of the sequestration for the purposes of the Bankruptcy Acts (*Galbraith*, 1885, 22 S. L. R. 602, per L. Kinnear, Ordinary). The Court will not readily interfere with the Sheriff's discretion (see *Jaffray*, 1883, 10 R. 719). Expenses *bonâ fide* incurred by a creditor in the cessio may be directed by the Sheriff to be paid by the trustee in the sequestration, out of the readiest of the funds of the bankrupt (44 & 45 Vict. c. 22, s. 11).

III. *Effect of Decree of Cessio and Vesting of Estate in Trustee.*—The decree of cessio ordains the bankrupt to grant a disposition *omnium bonorum* in favour of the trustee who has been appointed by the Sheriff in manner already mentioned. Such a disposition, however, is not required in order to transfer the moveable estate of the bankrupt to the trustee. By sec. 9 (5) of the Debtors Act, 1880, it is enacted that "until the debtor shall execute a disposition *omnium bonorum* for behoof of his creditors, any decree decerning him to do so shall operate as an assignation of his moveables in favour of any trustee mentioned in the decree for behoof of such creditors." The debtor's heritable estate, however, only passes to the trustee under the disposition *omnium bonorum* when executed. The effect of a decree of cessio was the same under the law prior to the Debtors Act (6 & 7 Will. IV. c. 56, s. 16). The decree is effectual to vest the moveable estate in the trustee without the necessity for intimation or possession following thereon (*Gray*, 1895, 22 R. 326; *Bald*, 1859, 21 D. 473; *M'Donald*, 1852, 14 D. 937). The decree operates from its date and not from the date

when it is extracted (*Gray, supra*). A final decerniture of cessio is required to operate the statutory assignation. Thus, where the interlocutor of Court found the debtor entitled to cessio, upon condition of his executing a certain conveyance, it was held not to have this effect (*Macgregor*, 1852, 15 D. 225).

Decree of cessio, unlike sequestration, has no effect in cutting down diligence executed prior thereto. Thus, if a creditor has poinded moveable effects of the debtor on the day prior to the date of decree, the diligence remains effectual, and he will be entitled, notwithstanding the cessio, to carry it out by sale (*Simpson*, 1886, 16 R. 131). He must, however, do so timeously (*Henderson*, 1896, 33 S. L. R. 483). The only course open to the other creditors, in order to prevent a preference over them being obtained, is that they individually take the requisite steps for obtaining a *pari passu* ranking, under the provisions of the 12th sec. of the Bankruptcy Act, 1856, by doing diligence on their respective debts, or by judicial production of their grounds of debt (see *Clark*, 1884, 12 R. 347; Bell, *Com.* ii. 485; *Simpson, supra*; and article on BANKRUPTCY).

A bankrupt with respect to whom a decree of cessio has been pronounced, is disqualified by Statute for various offices during the subsistence of the process. He is, if a peer, disqualified for sitting or voting in the House of Lords or on any Committee thereof, or for being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords (46 & 47 Vict. c. 52, s. 32 (1) (*a*); see also s. 33; 47 & 48 Vict. c. 16, s. 5 (1)). He is, in like manner, disqualified for being elected to or sitting or voting in the House of Commons or on any Committee thereof (*ib.*). These disqualifications are removed if the decree of cessio is recalled or reduced, or if the bankrupt obtains his discharge (47 & 48 Vict. c. 16, s. 5 (3)). Provision is also made for the vacating of the seat of a member of the House of Commons, who remains under disqualification by bankruptcy for the period of six months (46 & 47 Vict. c. 52, s. 33; 47 & 48 Vict. c. 16, s. 5 (1)). A bankrupt under cessio is further disqualified for being elected to or holding or exercising the office of provost, bailie, treasurer, dean of guild, deacon, convener of trades, or councillor, or commissioner or magistrate of police, or the office of member of a parochial board or school board, or road trustee, or member of any local authority, under any Act for the time being in force relating to local government in Scotland (47 & 48 Vict. c. 16, s. 5 (1)). These disqualifications are removed in the same way as those above mentioned (*ib.* s. 5 (3); 46 & 47 Vict. c. 52, s. 32 (2); 52 & 53 Vict. c. 71, s. 9). Where the bankrupt is holding any of the offices last specified at the time when the decree of cessio is pronounced, his office thereupon becomes vacant (46 & 47 Vict. c. 52, s. 34; 47 & 48 Vict. c. 16, s. 6; see *Thom*, 1885, 12 R. 701).

The form of the disposition *omnium bonorum* is prescribed by the Act of Sederunt of 22nd December 1882 (s. 2 and Schedule A). It is as follows:—"I [*insert name and designation of debtor*], in implement of a decree pronounced by the Sheriff or Sheriff-Substitute (as the case may be) of shire on the day of , do hereby, for the purposes of the Cessio Acts and relative Acts of Sederunt, dispone to [*insert name and designation of trustee*], as trustee for behoof of my creditors, and to his successors in office, my whole estate and effects, heritable and moveable. And I consent to the registration hereof for preservation.—In witness whereof, etc." No stamp duty is exigible in respect of a disposition *omnium bonorum* (43 & 44 Vict. c. 34, s. 11). The Act of Sederunt provides (s. 2) that the granting of the disposition may be dispensed with where the debtor has no heritable estate—the decree of cessio being in itself sufficient

to vest the moveable estate in the trustee (see *supra*). The heritable estate of the debtor, however, does not pass to the trustee, except under the disposition (see *Mackenzie*, 1894, 22 R. 45). The Debtors Act does not contain any specific provision for compelling the debtor to execute the disposition *omnium bonorum*. The powers given to the Sheriff under sec. 9 (2) of the Act, however, may perhaps be read as authorising the imprisonment of a debtor who refuses to sign (see Goudy on *Bankruptcy*, 484).

The conveyance in the disposition *omnium bonorum* does not include the bankrupt's *acquirenda*, which the trustee has no claim to, either under the decree of cessio or the disposition, and which may accordingly be attached by ordinary diligence at the instance of individual creditors, in the same way as if the cessio did not exist (*Reid*, 1894, 21 R. 935). Where the debtor is petitioner, however, cessio may be granted conditionally upon his assigning to the trustee prospective emoluments (so far as exceeding a *beneficium competentiæ*) derivable from an office or appointment occupied by him, such as a minister's stipend (*Simpson*, 1888, 16 R. 131; *Calderhead*, 1890, 17 R. 1098; and see *supra*, under *Award of Cessio*). It is a question whether a debtor's discharge in cessio could be made conditional upon his granting such an assignation. It is thought that it could not (see *Blaikie*, 1871, 10 M. 140). Nor do the decree or disposition carry funds of an alimentary character or incapable of alienation (*Brechin*, 1842, 4 D. 909; *Robertson*, 1873, 1 R. 237); nor the debtor's working tools or instruments of trade (*Reid*, 1778, Mor. 1392). It was held in one case that under the description of instruments of trade could not be included the furniture of a teacher of languages (*Gassiot*, 12 Nov. 1814, F. C.). A debtor in cessio has no right to *beneficium competentiæ* out of his estate vesting in the trustee (Bell, *Com.* ii. 483; More's *Notes to Stair*, ccccxxxvii.).

It has never been decided that a trustee in cessio is entitled to challenge preferences and alienations by the bankrupt which may be voidable under the Bankruptcy Acts or at common law. In the case of *Thomas* v. *Thomson* (5 M. 198), the judgment of the Court (p. 202) by its terms negatived generally the title of a trustee who was seeking to reduce both a promissory note and a conveyance of heritage granted by a bankrupt. The question discussed before the Court, however, would seem to have been only as to the trustee's title to reduce the conveyance, in the absence of a disposition *omnium bonorum* by the bankrupt. It has been held that a trustee under a private trust deed for creditors is not entitled to challenge preferences, in virtue merely of the conveyance to him by the bankrupt, who could not himself do so (*Fleming*, 1892, 19 R. 542). There is this difference, however, that while the trustee is in both cases in the position of assignee or disponee of the bankrupt, the trustee in cessio acts in a judicial process, under which creditors desirous of sharing in the distribution of the bankrupt's estate have no option but to come in and claim: and there is therefore more reason for regarding the trustee as clothed by the implied consent of the creditors with a title to enforce all remedies for the enlargement of the estate which the creditors could themselves enforce. Prior to the Bankruptcy Act of 1856 (see sec. 11), the title of a trustee in sequestration to challenge preferences had, without special enactment, been conceded in practice, where the trustee was in a position to aver that he represented claiming creditors having themselves a title to challenge. In any case, however, a trustee in cessio will not have a title to challenge deeds affecting the heritable estate of the bankrupt unless he have obtained a disposition *omnium bonorum* (*Thomas*, *supra*).

The expense of obtaining decree of cessio and the disposition *omnium*

bonorum falls to be paid out of the readiest of the funds thereby conveyed (43 & 44 Vict. c. 34, s. 9 (6)).

IV. *Duties, etc., of Trustee in Cessio.*—The functions of the trustee are mainly regulated by the Act of Sederunt of 1882. As already mentioned (*supra* II. (3)), he is nominated by the Sheriff in the decree of cessio. With regard to caution, the Act of Sederunt (s. 3) provides as follows:—"The Sheriff, having regard to the value of the debtor's estate, may order the trustee to find caution, to such an amount as the Sheriff may specify, for his intromissions and the proper discharge of his duties, and the Sheriff Clerk shall decide as to the sufficiency of the cautioner offered; or the Sheriff may dispense with such caution, and the Sheriff shall fix the bank in which the trustee shall deposit the funds of the estate, and the trustee shall be bound to deposit the funds therein, in accordance with the provisions of the Bankruptcy (Scotland) Act, 1856. The bond shall, *mutatis mutandis*, be in the form provided for trustees under that Act. Where caution has been required, the decree ordering the debtor to grant a disposition *omnium bonorum* in favour of the trustee shall not be extracted, nor the disposition granted, until such caution shall be found, or until a new trustee shall be nominated as hereinafter provided."

A new trustee may, where necessary, be nominated by the Sheriff:—"Where the trustee named shall decline to accept office, or, if ordered to find caution, shall fail within a reasonable time to do so, or where a trustee shall die, resign, be removed from his office, be rendered notour bankrupt, or shall permanently leave Scotland, or shall from any other cause become incapacitated for the discharge of his duties, the Sheriff may, without any written application, nominate, by a deliverance in the process, a new trustee. Such deliverance shall have the effect of investing the new trustee in the estates of the debtor, in the same way as if the new trustee had been the trustee named in the Sheriff's original deliverance, or as if his name had been inserted as trustee in the disposition *omnium bonorum*, if such had been granted" (A. of S. s. 20).

A trustee may be removed by the Sheriff, where this step is called for by neglect of duty, irregularity, or misconduct on his part. His conduct in office generally is subject to control by the Accountant of Court and Sheriff. The Act of Sederunt provides (s. 18): "In all processes of cessio, the Accountant in Bankruptcy [now the Accountant of Court] shall have the same powers of supervision and audit and otherwise, as are vested in him as respects sequestration under the Bankruptcy (Scotland) Act, 1856, and relative Statutes and Acts of Sederunt. [See ss. 156 *et seq.* of 19 & 20 Vict. c. 79, and also s. 167, which has, by the Statute Law Revision Act, 1892, been repealed from the words 'for which purposes,' occurring therein.]

"Trustees in processes of cessio shall be at all times bound to give such information relative to the cessio, and the proceedings therein, to the Accountant in Bankruptcy, and to transmit to him such accounts or other documents relative to the process, or copies thereof, as he may require.

"On complaint by the debtor, or any creditor, or *ex proprio motu*, the Accountant may inquire into any neglect of duty, irregularity, or misconduct on the part of the trustee, and may pronounce such order on the trustee as the case may require, or he may report the matter to the Sheriff. Any order or deliverance by the Accountant in Bankruptcy shall be subject to review by the Sheriff, on appeal taken within seven days after receipt of the order."

Sec. 19 provides: "On a report by the Accountant in Bankruptcy, or complaint by the debtor or any creditor, or *ex proprio motu*, the Sheriff may deal with any neglect of duty, irregularity, or misconduct on the part of the trustee, and may pronounce such order, or provide such remedy, as the case may require, and he may remove the trustee."

For the purpose of realising and ingathering the estate, the trustee has power to sell the bankrupt estate, in whole or part, without special instructions from the creditors (see *Clark*, 1890, 17 R. 1064). Individual creditors are not entitled to sue debtors to the bankrupt estate for payment of their debts (*Henderson*, 1889, 16 R. 341).

The trustee is entitled, where necessary, to employ a law agent in the same way as a trustee in sequestration. The law agent's account must be taxed by the Auditor of the Sheriff Court prior to the second meeting (A. of S., 1882, s. 11). The law agent is not an officer in the cessio proceedings, but the employé of the trustee (see *Noble*, 1876, 4 R. 77; *Rutherford*, 1891, 18 R. 1061); and his responsibility for the performance of his duties is to the trustee and not the creditors (see *Young*, 1827, 5 S. 472; *Gourlay*, 1827, 5 S. 743; *Berry*, 1830, 8 S. 509). The trustee is not entitled to devolve on the law agent any of his own proper work; and if he does so, he cannot obtain credit in his accounts for the agent's charges in respect thereof (see *Gourlay, supra*; *Wilson*, 1863, 2 M. 9). Where the trustee himself acts as law agent, he cannot make professional charges for doing so, over and above his commission; nor, it is thought, could his partner in business do so (see Goudy on *Bankruptcy*, 357, and App. 769). The law agent may lawfully purchase assets of the bankrupt estate (see *Rutherford, supra*; *Noble, supra*). For negligence on the part of a law agent the trustee will not be responsible, unless it be shown that the trustee was at fault in not appointing a fit and proper person (Bell, *Com.* ii. 323).

Where necessary for the proper discharge of his functions, the trustee is entitled to employ such other agents, besides the law agent, as may be required.

The debtor must, at all times when required, attend upon the trustee and give all necessary information relative to his affairs (A. of S., 1882, s. 16).

On application by the trustee, or by any creditor, the Sheriff may at any time call a meeting of the creditors to consider and dispose of any matters specified in such application (*ib.* s. 15).

The trustee is not expressly enjoined by Statute to keep a sederunt book, containing, as in a sequestration, an accurate record of the proceedings in the cessio, but the provisions of sec. 8 of the Bankruptcy and Cessio Act, 1881, requiring him to lay before the Accountant the sederunt book and accounts in applying for his discharge, assume that he will do so; and, where necessary, the Accountant of Court will enforce the performance of this important duty by the trustee, in virtue of his statutory powers of supervision and audit (see *supra*). The practice of the Accountant is to require the trustee to record in the sederunt book the following documents: (1) The extract deliverance awarding cessio and appointing the trustee; (2) the disposition *omnium bonorum*; (3) the bankrupt's examination, so far as recorded in writing; (4) the bankrupt's state of affairs; (5) the trustee's state of affairs; (6) the trustee's accounts, with the docquet approving such accounts; (7) the trustee's adjudication on the claims and scheme or schemes of division of the funds: (8) all interlocutors or deliverances by the Court; (9) *Gazette* notices, circular, and certificates, showing what circulars were communicated to the creditors, and all other documents necessary to explain

the management of the estate; (10) an abstract of the accounts under the following heads:—

Receipts									£	:	:
Trustee's commission					£	:	:				
Law expenses						:	:				
Miscellaneous ordinary expenses						:	:				
Miscellaneous extraordinary expenses						:	:				
					£	:	:				
Preferable debts	£	:	:			:	:				
Dividend on ordinary debt				:	:						
					£	:	:				
									£	:	:

The trustee must also note in the sederunt book the receipt of creditors' claims and affidavits, with the date of receipt.

The remuneration of the trustee is fixed by the Sheriff (A. of S., 1882, s. 11).

If a trustee, in the performance of his duties, incurs obligations in connection with the estate, by adopting contracts of the bankrupt or by entering into new engagements, he will, like a trustee in sequestration, be personally liable to third parties interested for implement thereof (see Bell, *Com.* ii. 320, 5th ed. ii. 379; *Jeffrey*, 1821, 1 S. 103, 2 S. App. 349; *Davidson*, 1826, 5 S. 121; *Mackessack*, 1886, 13 R. 445; Goudy on *Bankruptcy*, 358); and the creditors will not be personally bound to relieve him, in the absence of any special undertaking by them to that effect: although, of course, he will be entitled to indemnity from the bankrupt estate for all expenditure or obligations properly made or undertaken by him in the performance of his duties. Similarly, if he engage in litigation, he will be personally liable to the opposite party in expenses found due by him (see *Jeffrey*, *supra*; *Gibson*, 1833, 11 S. 656; *A. & B.*, 1865, 4 M. 83; *Purvis*, 1869, 41 Sc. Jur. 396; *White*, 1894, 21 R. 649). And in the case of a pending action by or against the bankrupt, which the trustee adopts, this liability extends to expenses incurred in the action by the opposite party prior to the date when the trustee takes it up (*Torbet*, 1849, 11 D. 694; *Ellis*, 1870, 8 M. 805; cf. *Muir*, 1843, 5 D. 579, as to case of trustee sisting himself for purpose of inquiry in an action which he does not adopt). The trustee, however, will not in such a case incur liability to the law agent of the bankrupt for his account in connection with the prior stage of the case (see *Peddie*, 1856, 18 D. 1306; *Swan*, 1829, 7 S. 268).

The trustee's discharge is provided for by the Bankruptcy and Cessio Act, 1881 (44 & 45 Vict. c. 22), which provides (s. 8):—

"After a final division of the funds, the trustee in a process of cessio may apply to the Accountant in Bankruptcy for a certificate that he is entitled to his discharge, and shall lay before him the sederunt book and accounts, with a list of unclaimed dividends, and the Accountant may, if he thinks proper, order intimation to be made to the creditors, and shall, if he is satisfied that the trustee has complied with the provisions of the hundred and forty-seventh section of the Bankruptcy (Scotland) Act, 1856, and is otherwise entitled to be discharged, and upon payment of any unclaimed dividends into the account of unclaimed dividends kept in the name of the Accountant, grant to the trustee a certificate under his hand to that effect, and such certificate shall have to all intents and purposes the

effect of a decree of exoneration and discharge by a court of competent jurisdiction."

The reference in this provision to sec. 147 of the Bankruptcy Act, 1856, is a mistake, the appropriate section being the 167th. The practice of the Accountant of Court is to grant certificates on the footing of the latter section being that intended by the Legislature. The form of certificate used is as follows:—"The Accountant of Court acknowledges receipt of the sederunt book in this cessio. He is satisfied that the trustee has complied with the provisions of the 167th section of the Bankruptcy (Scotland) Act, 1856, and is otherwise entitled to be discharged." The trustee should be careful, in adjusting his accounts, to retain a sufficient sum to meet the fee payable to the Accountant for examination and acknowledgment of the sederunt book.

V. *Ranking of Claims and Distribution of Estate.*—The procedure in these matters is regulated by the Act of Sederunt of 1882, which provides for the holding of a second meeting of the creditors and the debtor in presence of the Sheriff, at which the debtor may be subjected to farther examination, if desired; the state of ranking of the creditors is adjusted by the Sheriff; the trustees' accounts are submitted and adjusted, his remuneration fixed, and such dividend as is appropriate may be ordered to be paid. In the interval prior to the second meeting the trustee receives and adjudicates on the creditors' claims, and proceeds with the ingathering and realisation of the estate.

Secs. 4 and 5 of the Act of Sederunt provide as follows:—

"4. Within seven days after the trustee shall have obtained an extract of the decree ordaining the debtor to execute a disposition *omnium bonorum* in his favour, the trustee, by himself or his agent, shall (after having made due inquiry) report to the Sheriff orally at what date the estate of the debtor may probably be realised and ready for division, and the Sheriff, having regard to that report, or to any other material circumstance, shall, by a deliverance in the process, fix a suitable time and place for the second meeting of creditors to be held in his presence.

"5. Within seven days after the date of such deliverance, the trustee shall give notice in the *Edinburgh Gazette* in the form of Schedule B hereunto annexed, and he shall also post to each creditor mentioned in the debtor's state of affairs, or otherwise known to the trustee, a circular in the form of Schedule C hereunto annexed, and he shall also within that period give notice to the debtor to attend the second meeting."

The form of *Gazette* notice given in Schedule B is as follows:—

> The estates of [*insert name and designation of debtor*], have, in virtue of, and for the purposes of the Cessio Acts, been transferred to [*insert name and designation and place of business of trustee*], as trustee for behoof of his creditors. Creditors must lodge their claims with the trustee on or before [*insert date*]. The creditors meet before the Sheriff within on at o'clock noon.
>
> [*To be signed by the trustee or his agent.*]

The form of circular to creditors given in Schedule C is as follows:—

> The estates of [*insert name and designation of debtor*] have been transferred in virtue of, and for the purposes of, the Cessio Acts, to [*insert name and designation and place of business of trustee*] as trustee for behoof of his creditors.
>
> Creditors claiming on the estate must transmit to the trustee an affidavit and claim, with the vouchers of debt, on or before [*insert date*].
>
> Creditors whose claims may be rejected, in whole or in part, will have notices posted to them on or before [*insert date*].
>
> Creditors whose claims may be admitted will receive no further notice.

The claims, with the trustee's deliverances thereon, may be inspected in the Sheriff Clerk's office, , on and after the [*insert date*].

The creditors will meet, in presence of the Sheriff, within on the day of at o'clock noon, and at that meeting the Sheriff will hear and determine any questions which may be raised as to the claims admitted or rejected, or as to the trustee's or law agent's accounts, and will fix the trustee's remuneration. At said meeting a dividend may be declared.

Those creditors who intend to object to any of the trustee's deliverances on claims, or to support any such deliverance objected to, must be prepared, if necessary, to lead proof before the Sheriff at said meeting, and may obtain from the Sheriff Clerk a warrant to cite witnesses or custodiers of writs.

Any creditor intending to object to the trustee's deliverance on any other creditor's claim, must post in a registered letter to that creditor and to the trustee, at least three days before said meeting, a notice of such intention, stating the nature and particulars of the objection.

The state of the debtor's affairs, so far as the trustee can ascertain at present, is as follows:—

1. Liabilities	£	:	:
2. Assets, less preferable claims . .		:	:
Deficiency . . .	£	:	:

A. B., Trustee.

For the proof of debts the same rules and forms apply as in sequestration. Sec. 6 of the Act of Sederunt provides:—

"The rules of the Bankruptcy (Scotland) Act, 1856, regarding the nature and form of affidavits, or claims of creditors for ranking, and the valuation of securities and deductions to be made, and regarding the documents of debt to be produced therewith, shall, *mutatis mutandis*, apply to claiming and being ranked for dividends in processes of cessio" (see ss. 21–24 and 49–66 of 19 & 20 Vict. c. 79).

Creditors must "transmit their affidavits and claims and documents of debt to the trustee twenty-one days before the said second meeting, or, in the case of a dividend being declared at a subsequent period, fourteen days before the date fixed for the payment of such dividend" (A. of S. 1882, s. 7). Should a creditor fail to lodge his claim in time for a first dividend, he will, in the event of his lodging it in time for a subsequent dividend, be entitled to an equalising dividend (*ib.*). The lodging of a claim in cessio interrupts the running of prescription (*Thomas*, 1868, 6 M. 777).

The claims when lodged must be adjudicated upon by the trustee, and the adjudication must be completed ten days prior to the second meeting, and the results made known, to admit of objections to any of the deliverances being heard and disposed of by the Sheriff at the second meeting. The provisions of the Act of Sederunt (ss. 8 and 9) are as follows:—

"8. Ten days prior to the said second meeting, the trustee shall adjudicate upon the claims of the creditors, admitting or rejecting them in whole or in part, and he shall prepare a list thereof, with his deliverances thereon, which list, with the claims, vouchers, and whole process, shall also, ten days before said meeting, be lodged with the Clerk of Court, and be subject to inspection by the debtor and by the creditors. Where the trustee shall reject, in whole or in part, any claim, he shall post notice thereof to the creditor ten days at least before said second meeting.

"9. (1) Where the debtor intends to object to any deliverance by the trustee admitting, in whole or in part, any claim, or (2) where any creditor intends to object to any deliverance ranking any other creditor, or (3) where a creditor intends to object to a deliverance rejecting, in whole or in part, his claim, the debtor or the objecting creditor respectively shall, in the two first cases, give notice to the trustee and to the other creditor whose

claim is objected to, and, in the third case, to the trustee, of his intention, and of the nature and particulars of the objection, by a registered letter posted three days at least before said second meeting, and there shall be produced a copy of the letter, of notice and the post-office receipt for the letter, at the meeting."

Where the debtor, or the trustee, or any creditor, desires to lead evidence on any matter at the second meeting, he is entitled to obtain from the Sheriff Clerk a diligence for citing witnesses and havers (A. S., 1882, s. 10). If necessary, the Sheriff will grant second diligence.

On the day appointed by the Sheriff under the provision in s. 4 above quoted, the second meeting of the creditors is held in his presence. The procedure at the meeting is regulated by s. 11 of the Act of Sederunt, which provides as follows:—

"XI. At the said second meeting the debtor and the trustee shall attend, and the creditors may also attend by themselves or their mandatories or agents. The debtor or any creditor (notice having been given as above provided) shall be heard orally in support of objections to the trustee's deliverances admitting in whole or in part claims, and any creditor may in like manner be heard in support of his objections to the rejection in whole or in part of his own claim; and the Sheriff shall, if desired by the trustee, or by the debtor, or by any creditor, make a note of such objections, and of the answers made thereto, and deliver the same to the Clerk of Court, and on a *viva voce* hearing, and after such proof, if any, as he may allow (which proof shall be recorded if desired by the trustee, or by the debtor, or by any creditor), shall dispose of the objections summarily, and settle the rankings of the creditors. The debtor shall be bound to submit at the second meeting to such further examination relative to his affairs as the Sheriff may appoint.

"The law agent's account shall be taxed by the Auditor of the Sheriff Court previous to the meeting, and be produced thereat.

"The trustee's accounts, with the relative vouchers, shall be produced at the meeting, and submitted for the consideration of the Sheriff and of the debtor and creditors, and shall be approved of, or modified and adjusted, by remit or otherwise, as the Sheriff shall determine; and the Sheriff shall fix the trustee's remuneration. Where funds have been realised, the Sheriff may order such sum as he shall appoint to be paid, on such day as he shall specify, as an interim or final dividend to the creditors, according to their rankings as adjusted; or he may postpone payment of a dividend to such date as he may then or afterwards fix. The Sheriff, on sufficient cause, may adjourn consideration of any of the matters mentioned in this section to another diet or diets."

An interlocutor of the Sheriff, reviewing the trustee's deliverance in regard to the admission or rejection of a creditor's claim, may be appealed to the Court of Session (*Taylor's Tr.*, 1888, 15 R. 313).

If, before the date of the second meeting, it is apparent to the trustee that there will be no funds for division among the creditors, it is his duty to report the fact verbally to the Sheriff, who may thereupon in writing dispense with deliverances on claims and the making up of a list of ranking (A. S. s. 12). This may be done when the trustee applies to the Sheriff to fix the date of the second meeting; and his investigations into the position of the estate for the purpose of making his report to the Sheriff under s. 4 of the Act of Sederunt, will put him in a position to follow this course in most cases where there are no funds for division.

Where funds become available for division subsequent to the second

meeting, the procedure to be followed is regulated by ss. 13 and 14 of the Act of Sederunt:—

"XIII. If, at any time subsequent to the second meeting, the trustee shall have in hand funds, or shall be about to come into possession of funds, which will admit of a dividend to the creditors, it shall be his duty to apply verbally to the Sheriff to fix a date for payment of a dividend, and the Sheriff, by a deliverance in the process, may fix a date accordingly.

"XIV. Before making up a state of ranking for any such dividend as is last mentioned, or for any dividend for which a postponed date had been fixed at the second meeting, the trustee shall send notice to any creditor mentioned in the debtor's state of affairs, or known to him, who had previously failed to lodge his claim, intimating the proposed dividend, and stating the last day for lodging claims.

"If, from new claims being lodged, or other cause, the state of ranking shall require to be remodelled, the trustee shall remodel the same in accordance with the previous provisions herein, subject to the approval of the Sheriff; and any additional accounts of the trustee or law agent shall be previously taxed and adjusted by the Sheriff, all as hereinbefore provided (*i.e.*, under s. 11 in regard to the second meeting; see *supra*).

"The Sheriff may proceed under this section with or without notice to the debtor or creditors, and with or without any meeting of creditors, as he may deem proper, having regard to the nature or importance of the business to be transacted."

VI. *Discharge of the Bankrupt.*—Under the law existing prior to the Debtors Act, a bankrupt in cessio could never obtain discharge in any other mode than by payment of his debts in full; and all property acquired by him subsequent to the cessio remained liable to the diligence of unpaid creditors. The Debtors Act did not make any change on this state of matters; but by the Bankruptcy and Cessio Act, 1881 (44 & 45 Vict. c. 22), full provision was made for a bankrupt in cessio obtaining discharge, on conditions virtually the same as those obtaining in the case of sequestration. The provisions of the Act are not limited to cessios under the Debtors Act. On the expiration of six months from the date of decree of cessio, the bankrupt is (subject to the conditions aftermentioned) entitled to apply to the Sheriff to be finally discharged of all debts contracted by him before the date of such decree, provided a majority in number and four-fifths in value of the creditors who have produced oaths concur (44 & 45 Vict. c. 22, s. 5: 19 & 20 Vict. c. 79, s. 146). After twelve months he may apply, with the concurrence of a majority in number and two-thirds in value; after eighteen months, with the concurrence of a majority in number and value; and after two years, without any consents of creditors (*ib.*) It is not necessary to convene a meeting of creditors with reference to such discharge. The consents required must be in writing, and be produced to the Sheriff in the application for discharge (44 & 45 Vict. c. 22, s. 5).

Besides the concurrences of creditors, where requisite, the debtor must prove that one of the following conditions has been fulfilled:—

(*a*) That a dividend of five shillings in the pound has been paid out of the estate of the debtor, or that security for payment thereof has been found to the satisfaction of the creditors; or

(*b*) That the failure to pay five shillings in the pound has, in the opinion of the Sheriff, arisen from circumstances for which the debtor cannot justly be held responsible (44 & 45 Vict. c. 22, s. 7.

See as to application of these conditions, *Shand*, 1882, 19 S. L. R. 562; *Wilson*, 1882, 20 S. L. R. 17; *Clarke*, 1883, 11 R. 246; *Boyle*, 1885, 12 R. 1147; *Phillips*, 1885, 13 R. 91; *Reid*, 1890, 17 R. 757; *Calderhead*, 1890, 17 R. 1098).

In order to determine whether either of the foresaid conditions has been fulfilled, the Sheriff has power to require the debtor to submit such evidence as he may think necessary, and to allow any objecting creditor or creditors such proof as he thinks right (*ib.*). In the event of discharge being refused in respect of failure to comply with these conditions, the debtor, if his estate yields or if he pays to his creditors such additional sum as will, with a dividend previously paid out of his estate, make up five shillings in the pound, is entitled to apply for and obtain his discharge in the same manner as if a dividend of five shillings in the pound had originally been paid out of his estate (*ib.*).

In addition to the above conditions as to dividend, it is necessary that the bankrupt should have complied with all the material requirements of the Statute as to the surrender of his estate, submitting himself for examination, etc. (see Goudy on *Bankruptcy*, 494).

A deliverance by the Sheriff, granting, postponing, or refusing a discharge in cessio, is final and not subject to review (44 & 45 Vict. c. 22, s. 5).

VII. *Appeal in Cessio.*—The Debtors Act, 1880 (s. 9 (4)) provides that any judgment, interlocutor, or decree, pronounced in a petition for cessio under that Act, may be reviewed on appeal "in the same form and subject to the like provisions, restrictions, and conditions as are by law provided in regard to appeals against any judgment, interlocutor, or decree, pronounced in any other process of *cessio bonorum*." This refers back to the Sheriff Court Act of 1876, which, by s. 26 (4), enacts, with reference to processes of *cessio bonorum*, that judgments or interlocutors in such actions shall be reviewed on appeal, "in the same form, and subject to the like provisions, restrictions, and conditions, as are by law provided in regard to appeals against any judgment or interlocutor pronounced in any other action in the Sheriff's ordinary Court." The right of appeal in cessio is thus regulated by the rules enacted in the Sheriff Court Act, 1876 (ss. 24–29), and the Sheriff Court Act, 1853 (s. 24), regarding appeals to the Sheriff or the Court of Session in ordinary Sheriff Court actions (*Adam*, 1883, 10 R. 670; see *Simpson*, 1888, 16 R. 131; *Taylor's Tr.*, 1888, 15 R. 313; *Henderson*, 1896, 33 S. L. R. 483). The competency, in respect of value, of an appeal to the Court of Session regarding a creditor's claim, is determined by the amount of the debt alleged to be due in the creditor's affidavit (*Henderson, supra*). It has accordingly been held that the Sheriff's deliverance under s. 9 (1) of the Debtors Act, finding that there is *primâ facie* evidence of notour bankruptcy and ordaining the debtor to appear for examination, etc., is not appealable (*Adam, supra*; *Ross*, 1884, 12 R. 26, where there was a warrant to search; *Stewart*, 1883, 20 S. L. R. 580). The decree of the Sheriff granting or refusing cessio is subject to review (*Robertson*, 1888, 16 R. 235; *Simpson*, 1888, 16 R. 131; *Reid*, 1890, 17 R. 757; *Calderhead*, 1890, 17 R. 1098). In ordinary course of procedure, this will be the first appealable interlocutor (see *Adam*, 1883, 10 R. 670). An appeal against a deliverance of the trustee, admitting or refusing a ranking on a creditor's claim, is competent (*Taylor's Tr.*, 1888, 15 R. 313). Where an interlocutor of the Sheriff-Substitute adjourning the diet for the first meeting, and refusing leave to the debtor to object to the examination, was appealed to the Sheriff, strong doubt was expressed by the judges of the Court of

Session, in a subsequent stage of the case, as to the competency of the appeal (*Meikle*, 1884, 11 R. 867).

Individual creditors whose rights are affected may appeal or appear as respondents in an appeal (*Meikle, supra*; *Jaffray*, 1883, 10 R. 719; 6 & 7 Will. IV. c. 56, s. 8). But where a petition for cessio was dismissed, and the judgment was affirmed by the Sheriff, it was held not competent for a creditor, who up to that point had not appeared in the process, to present an appeal to the Court of Session (*Meikle, supra*).

No fee-fund dues or other dues of Court are exigible in respect of any proceedings under the Cessio Acts; nor is any stamp duty or other government duty exigible in respect of any disposition which a debtor is required or deemed to execute in terms thereof (43 & 44 Vict. c. 34, s. 11).

Form of Petition for Cessio at the instance of a Creditor.

(Debtors Act, 1880, s. 8.)

In the Sheriff Court of .

C. D. [*design*], *Pursuer*;

AGAINST

A. B. [*design*], *Defender.*

The above-named pursuer submits to the Court the Condescendence and Note of Plea in Law hereto annexed, and prays the Court—

To appoint a trustee to take the management and disposal of the defender's estate, for behoof of his creditors; to ordain the defender, if so required, to execute a disposition *omnium bonorum* in favour of such trustee for their behoof; and to ordain that the expenses of obtaining the decree to follow hereon, and of the said disposition *omnium bonorum*, if executed, shall be paid out of the readiest of the funds conveyed by such decree or disposition; [*where necessary, add*, as also, and in the meantime, or at any future stage of the process, to grant warrant to any officer of Court, in presence of a concurrent or witness, to take possession of, and put into such safe custody as the Court shall appoint, any bank notes, money, bonds, bills, cheques, drafts, or other moveable property belonging to or in the possession of the defender, and, if necessary for that purpose, to open lockfast places, and to search the dwelling-house, shop, counting-house, warehouse, or other premises, and the person of the defender].

Condescendence.

1. The defender, who has his ordinary domicile in the county of , is notour bankrupt within the meaning of the Debtors (Scotland) Act, 1880 [*or*, the Bankruptcy (Scotland) Act, 1856, *as the case may be*], in respect of insolvency concurring with the following diligence [*state the kind of diligence*].

2. The pursuer is a creditor of the defender to the extent of £ [*state grounds of debt*].

3. Intimation was given to the defender on the day of , by an officer of Court, that this application would be made on the day of , conform to execution of intimation produced.

4. The following is a list of the creditors, or pretended creditors, of the defender, so far as known to the pursuer:—

(1) [*Name and design.*]
(2) „
(3) „ etc.

Plea in Law.

1. The defender being notour bankrupt, and the pursuer being a creditor of the defender, decree of cessio should be pronounced as craved.

In respect whereof.

FORM OF PETITION FOR CESSIO AT THE INSTANCE OF A DEBTOR.

(Debtors Act, 1880, s. 7.)

In the Sheriff Court of .

A. B. [*design*], *Pursuer;*

AGAINST

C. D. [*design*]
E. F. [*design*]
G. H. [*design*], etc.,
All creditors or claiming to be creditors of the said *A. B.*

The above-named pursuer submits to the Court the Condescendence and Note of Plea in Law hereto annexed, and prays the Court—

To find the pursuer entitled to the benefit of the process of *cessio bonorum*, and to grant decree accordingly, and to appoint a trustee to take the management and disposal of the pursuer's estate for behoof of his creditors.

CONDESCENDENCE.

1. The pursuer is notour bankrupt and unable to pay his debts, which amount to £ .

2. The pursuer is ready to surrender his whole estate for behoof of his creditors. His inability to pay his debts has arisen from [*state the cause*].

PLEA IN LAW.

The pursuer being notour bankrupt, and willing to surrender his whole estate for behoof of his creditors, decree of cessio should be granted as craved.

In respect whereof.

Cessio bonorum in Roman Law.—In the ancient law the only mode of execution for debt was personal, the creditor having the right to seize and make a bondsman of his debtor, to sell him *trans Tiberim*, or even, perhaps, to kill him. Under the prætors the power of proceeding directly against the property of the debtor was for the first time granted to creditors, who, by means of the so-called *missio in bona*, were empowered to take possession of the entire estate of the debtor. Thus during the period of the republic, creditors had the option of proceeding against their debtors either by personal execution, according to the old civil law, or by execution against the estate, according to the prætorian law. The condition of debtors who were unable to pay was materially ameliorated in the early days of the empire by the promulgation of a lex Julia, which first introduced the procedure known as *cessio bonorum*, under which a debtor was enabled, by making a voluntary assignation of his property, to escape liability to arrest and imprisonment (*Cod.* vii. 71. 7). It was an act of voluntary bankruptcy, and it had this advantage, that the debtor did not become *infamis*, like an ordinary bankrupt (*Cod.* ii. 12. 11, vii. 71. 8). Further, the debtor had the privilege known as the BENEFICIUM COMPETENTIÆ (*q.v.*), *i.e.* the right to retain so much of his property as was necessary for his bare subsistence, he being condemned only *in quantum facere potest*. Hence a small allowance made to a bankrupt for his maintenance could not be seized by his creditors (*Dig.* 42. 3. 6; 42. 3. 4. 1). The *cessio bonorum*, however, did not release the debtor from liability, if he could afterwards pay the debt without leaving himself in want (*Dig.* 42. 3. 4). At first certain formal proceedings were necessary, but in the later law it was enough if a debtor by some means clearly indicated his wish to surrender his estate to his creditors (*Cod.* 7. 71. 6 pr.). Where the debtor's insolvency had been brought about

by his fault, he could not claim to make a *cessio*. In all essential points the procedure after a *cessio bonorum* seems to have been the same as in ordinary bankruptcy.

Chairman.—See MEETING (PUBLIC).

Chairman (County Council).—The chairman of a county council, who is called the *convener of the county*, and is, in virtue of his office, a justice of the peace for the county, is a "fit person" elected by the council from among the councillors (Local Government (Scotland) Act, 1889, s. 10 (1)). He is elected annually, and the ordinary day of election is the third Tuesday of December in each year. The election is the first business transacted at the meeting (s. 73 (5)). The term of office is for one year (s. 10 (2)). A county council may appoint a county councillor to be vice-convener, to hold office during the term of office of the convener: and, subject to any rules made by the council, anything authorised or required to be done by or to or before the convener, may be done by or to or before the vice-convener (s. 10 (3)). A casual vacancy in the office of convener or vice-convener of the county, caused by death, resignation, or disqualification (see COUNTY COUNCIL—*Disqualification of Councillor*), must, as soon as practicable, be filled up by the county council; but the person who fills the vacancy retains his office so long only as the vacating convener or vice-convener would have retained it if the vacancy had not occurred (s. 10 (4)). Where the convener and vice-convener are absent, the councillors present choose their own chairman (s. 73 (5)). The chairman of a meeting has a casting as well as a deliberative vote; and when, on the selection of the chairman of the meeting, an equal number of votes is given in favour of two or more persons, the meeting determine by lot which of these persons is to be chairman (s. 73 (5)).

Standing Joint Committee.—The standing joint committee of a county council elects one of their own number to be chairman (s. 18 (2).). In the absence of the chairman, the committee elect one of their own number to be preses. The chairman has a casting vote in addition to his own vote (s. 18 (5)) (Police Act, 1857, s. 2). On the requisition of the chairman, meetings may be called on not less than six days' notice (s. 18 (4)).

Joint Committee.—Where the county council appoint a joint committee, the committee elects a chairman, who holds office for such period as may be fixed at the time of his election. In the case of an equality of votes for two or more persons as chairman, one of these persons is elected by lot. The chairman has a casting as well as a deliberative vote (s. 76 (7)).

District Committee.—A district committee may from time to time elect a chairman, who holds office for such period as may be fixed at his election: and in the case of an equality of votes for two or more persons as chairman, one of them is elected by lot. The chairman has a casting as well as a deliberative vote (s. 80). He is *ex officio* a justice of the peace for the county (Local Government (Scotland) Act, 1894, s. 40).

Chalder.—This represents sixteen bolls:—there being four lippies to the peck, four pecks to the firlot, and four firlots to the boll, of old Scottish measure. The chalder has long been, and is still, in use in the Teind Court (see TEIND COURT) in settling the stipends of parishes

where these are derived from teinds, the augmentation being fixed in chalders, and the old stipend being usually referred to as consisting of so many chalders. When the augmentation is granted, it is described in the decree as such a quantity of victual, half meal half barley, in imperial weight and measure as shall be equal to three (or such other number as may be granted) chalders of the late standard weight and measure of Scotland.

When awarding stipends under the Act 1617, c. 3, the Commissioners were empowered to grant a minimum stipend of five chalders victual or 500 merks, £27, 15s. $6\frac{8}{12}$d. sterling, so that the conversion of a chalder at that time was 100 merks, equal to £5, 11s. $1\frac{4}{12}$d. sterling. The rate of conversion of a chalder was raised some time after the Union to £100 Scots, or £8, 6s. 8d. sterling (see Connell, i. 422). In the case of *Earl of Hopetoun* (1832, 10 S. 361), a report was given in by Mr. S. Reid, Depute Teind Clerk, as to the value of a chalder of the different classes of grain. Prior to 1794, he says victual, half meal half barley or bear, was valued at £100 Scots per chalder; oats at 100 merks per chalder; and wheat at £120 Scots per chalder. He adds that the later practice had been to take a chalder at an arbitrary price, between 15s. and 20s. per boll, for victual, half meal half barley.

Stipends require to be awarded in grain or victual under the Teinds Act, 1808, unless where it shall appear necessary to provide a money stipend; and the grain or victual stipend falls to be converted into and paid in money according to the fiars prices of the county, which fluctuate very much (see Fiars Prices). The value of a chalder consequently varies from year to year, and is not the same in any two counties. For the value of a chalder in the different counties in Scotland in some recent years, see Elliot, *Teind Court Procedure*, 227.

See Augmentation; Teinds.

Chalking of Door.—A method of warning tenants in burghs to remove. A burgh officer gives verbal notice to the tenant to remove, and chalks on the most patent door of the building the initials of the reigning sovereign, and the year, *e.g.* "V. R. 1896," in the presence of one witness, forty days before the term of removal. The proper evidence of the warning is the written execution returned by the officer; but it would appear that parole evidence is also allowed (*Robb*, 1859, 21 D. 277, per L. Deas, at 282; *Scott*, 1829, 7 S. 592). "The better opinion seems to be that chalking is sufficient warning without further intimation" (Rankine on *Leases*, 2nd ed., 521; *Robb, supra*). On the lapse of the term, the landlord gets a summary warrant of removal from the burgh magistrate, which may be followed by ejection after a charge of six days. Other methods of warning are, the tenant's acknowledgment that he has been timeously warned, and intimation to the tenant by registered letter, signed by the person entitled to give notice, or by the law agent or factor for such person (49 & 50 Vict. c. 50, s. 6).—[See Stair, ii. 9. 40; Ersk. ii. 6. 47; Bell, *Prin.* s. 1278; Bell on *Leases*, ii. 118; Hunter, *Landlord and Tenant*, ii. 82; Rankine on *Leases*, 2nd ed., 251.]

Challenge.—To challenge another to fight a duel is, according to the law of Scotland, a criminal offence at common law. The practice of duelling was at one time so prevalent in Scotland, that the Legislature

endeavoured to repress it by the enactment of severe statutory penalties. The Act of 1600, c. 12, was passed, penalising the actual fighting of a duel. (See DUELLING.) The Statute of 1696, c. 35, was subsequently passed to restrain the mere giving or accepting a challenge to fight. By that Act it was provided "that whosoever, principal or second, or other interposed person, gives a challenge to fight a duel or single combat, or whosoever accepts the same, or whosoever, either principal or second on either side, engages therein, albeit no fighting ensue, shall be punished by the pain of banishment and escheat of moveables, without prejudice to the Act already made against the fighting of duels." To support an indictment upon this Statute, the challenge had to be direct, serious, and regular. Ambignous taunts, or sudden defiance given in the height of passion, did not constitute a challenge in the sense of the Act. But if the challenge was duly formal, the language of the Statute applied not only to the challenger and the challenged, but also to the person who bore the challenge, and to those who were present at the duel as spectators, if they were there by design (Ersk. iv. 4. 49). The Acts of 1600 and 1696 were repealed by 59 Geo. III. c. 70. Bell, commenting on the case of *M'Kechnie*, 1832 (Notes, 111), points out that, in so far as relates to the Act of 1696, the effect of its repeal was merely to abolish the statutory punishment, but that the offence treated of, having been formerly indictable at common law, continues to be so, notwithstanding the abrogation of the Statute. The same, he adds, holds true of the offences dealt with by the Act of 1600. Although it is thus competent to libel challenging to fight as a substantive crime at common law, this offence is now charged and dealt with as a breach of the peace (Macd. 188; Hume, i. 442; Alison, i. 53).

By the law of England, challenges to fight, either by word or letter, or the bearing of such challenges, are misdemeanours, punishable by fine and imprisonment, according to the circumstances of the offence. (Steph. *Com.*, 12th ed., iv. 187.) See DUELLING.

Challenge of Jurors is the act of objecting to their acting on a trial.

In all CRIMINAL TRIALS, jurors may be challenged by the prosecutor and the person or persons accused. Challenges are either peremptory, compelling the exclusion of the juror challenged without reasons assigned, or on cause shown. By the Act 6 Geo. IV. c. 22, s. 16, both the prosecutor and each person on trial before any criminal Court are respectively entitled to challenge five of the jurors for any one trial, without being obliged to show any reason therefor. The right of challenge given to the prosecutor is in practice seldom exercised. Such peremptory challenge must be made when the juryman to be challenged is balloted for (*Dawson*, 1863, 4 Irv. 357). Of the five peremptory challenges so given to the prosecutor and each person accused, not more than two may be of special jurymen. Should a number of persons be accused in one case, and for convenience be tried in sets, the right to challenge jurors peremptorily or otherwise is confined to those actually on trial (*Alex. Macleod and Others*, H. C. Edin., 1888, 1 White, 554); but unless a jury balloted for the trial of any one set be, of consent of the prosecutor and persons accused in the next set, continued for their trial, a fresh jury must be balloted, and the prosecutor and the accused persons in each set where a fresh jury is balloted, are entitled to exercise their right of challenge. The right of peremptory challenge thus conferred does not deprive the prosecutor or persons accused of their right to object to any juror on cause

shown. But no objection can be made to any juror after he shall have been sworn to serve (6 Geo. IV. c. 22, s. 16).

As to the grounds upon which objection may be taken to a juryman, sec. 1 of the Act last mentioned, while limiting the age of those who may be qualified to act as jurors to between 21 and 60, further excepts certain classes specified in sec. 2, namely: All peers; all judges of the Supreme Courts, including the Judge-Admiral and Commissaries of Edinburgh; all Sheriffs of counties: all magistrates of royal burghs; all ministers of the Established Church, and all other ministers of religion who shall have duly taken and subscribed the oaths and declaration required by law, and whose place of meeting shall be duly registered; and all parochial schoolmasters; also all advocates practising as members of the Faculty of Advocates; all writers to the signet practising as such; all solicitors practising before any of the Supreme Courts; all procurators practising before any Inferior Court, having severally taken out their annual certificates; all clerks or other officers of any court of justice actually exercising the duties of their offices; all jailers or keepers of houses of correction; all professors in any university; all physicians and surgeons, duly qualified as such and actually practising; all officers in His Majesty's navy or army in full pay; all officers of Customs or Excise; all messengers-at-arms; and other officers of the law.

Several other Statutes grant exemption to various classes, namely: 54 & 55 Vict. c. 46, s. 9—officers of the post-office; 32 & 33 Vict. c. 36—light-house-keepers and their assistants; 53 & 54 Vict. c. 21, s. 8—commissioners and other officers of Inland Revenue: 41 & 42 Vict. c. 33, s. 30—registered dentists; and 44 & 45 Vict. c. 58, ss. 147, 175, 176, 178—soldiers, pensioners, and volunteers acting with the regular army and subject to military law. These, however, differ from the Act of 6 Geo. IV. c. 22, inasmuch as that Act excepts the classes therein specified from those who may be qualified as jurors, while the other Statutes appear merely to confer upon the respective classes the privilege of exemption, *e.g.* that as to any dentist, which bears that he "shall be exempt if he so desires from serving on all juries," and as to officials of Inland Revenue, which bears that no such officials of Inland Revenue as are set forth in the Statute "shall be compelled . . . to serve on any jury."

Objection to any juror who may be returned as qualified in respect of insufficient qualification, can only be proved by the oath of the juror objected to (6 Geo. IV. c. 22, s. 16). The following are good grounds of challenge:—Minority, infamy, outlawry, enmity, insanity, deafness, dumbness, and idiocy. It is doubtful whether aliens are liable or competent to serve as jurors (*Bartlett*, H. C., Edin., 16 Nov. 1876, 3 Coup. 357). It was at one time thought that fleshers or butchers could not serve on criminal juries. It has, however, been decided that they are under no legal disqualification in this respect (*Incorporation of Fleshers of Edinburgh*, 29 May 1826, Shaw, *Justiciary Cases*, 156).

Sec. 21 of 6 Geo. IV. c. 22, declares that that Act shall not apply to trials of high treason or misprision of high treason, which are in Scotland, since the Act of 7 Anne, c. 21, judged by the law of England, whereby—as by the common law of England—the accused has peremptory challenges of jurors to the number of thirty-five (Hume, i. 545, and authorities there cited).

In the trial of CIVIL CAUSES by jury, each party has at common law the right of challenge for cause shown, though it is seldom necessary to exercise it. The grounds of challenge have usually been on account of avowed enmity of a juror to the party challenging, or that the juror

challenged has an interest in the cause. Each party is entitled to four challenges without assigning any cause, the challenges for cause assigned being first made respectively (55 Geo. III. c. 42, s. 21). Two or more defenders have together only four peremptory challenges (*Dobbie*, 19 June 1861, 23 D. 1139). It is a question whether this applies to special juries (*Duke of Buccleuch*, 21 Dec. 1866, 5 M. 214). In cases under the Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19), and the Acts amending the same, which proceed before the Sheriff, parties concerned have the usual lawful challenges for cause shown, but each party has only three peremptory challenges (s. 4). In inquires under the Fatal Accidents Inquiry (Scotland) Act (58 & 59 Vict. c. 36), peremptory challenges of jurors are not allowed, but any person interested may state to the Sheriff (who presides) any objection to a person balloted to serve on the jury, and if the Sheriff is satisfied that sufficient cause has been shown why the person objected to should not serve, he shall not allow such person to serve on the jury (s. 4, subs. 6).—[Hume, ii. 310, 311; Alison, ii. 385, 386; Macfarlane, *Practice in Jury Causes*, 120, 121; Mackay, *Manual*, 349.]

Chamberlain of Scotland.—The Great Chamberlain of Scotland—*Camerarius*—was a high officer of State and of law. He was keeper, apparently, of the king's treasury chamber until the institution of the office of treasurer by James I. He had a universal jurisdiction in relation to burghs in the matters of customs, police, and trade, the regulation of weights and measures, and the observance of law. It was his duty to hold periodical wapinshaws in the burghs, to examine the burgh accounts, and see that the burgh revenues were properly expended. In the exercise of his jurisdiction, he held circuits—Chamberlain-Airs—in the burghs. Appeals lay to him from the decisions of the magistrates; and an appeal might be taken from the Chamberlain-Air to the Chamberlain Court—the Court of the four Burghs—at Haddington, afterwards at Edinburgh. Of this Court the Chamberlain was convener and president. The office of Chamberlain of Scotland had ceased to be exercised before the time of Stair. —[Stair, iv. i. 4. 19. 20; Ersk. i. iii. 38; Innes, *Scotch Legal Antiq.* 76, 96, 114; Crawford, *Officers of State*, 251, "Iter Camerarii," *Acts* (Record ed.), i. 693, etc.; 1469, c. 38; 1491, c. 36; 1503, c. 96, etc.]

Chamberlain (The Lord) of the Household—The Lord Chamberlain of the Household.—An officer of the Royal Household, next in precedence to the Lord Steward of the Household, and *ex officio* a member of the Privy Council. He is a member of the Government for the time being. He has the superintendence and government of the royal wardrobe, and of the sovereign's chambers, with the exception of the bed-chamber. He has the government also of the artificers employed in the Queen's service, of the Queen's messengers, comedians, etc. The Queen's chaplains, sergeants-at-arms, physicians, surgeons, apothecaries, etc., are under his inspection. By 6 & 7 Vict. c. 68, he has a power of licensing theatres (not being patent theatres) in the Metropolis, and also within those places where the sovereign occasionally resides. By sec. 12 of the Act, a copy of every new play or addition to old play must be submitted to him seven days before it is acted for hire in any theatre in Great Britain. He has the power of disallowing any such play, or part of play, either before or after the expiration of the seven days. By sec. 14 he may forbid the acting

of any play anywhere when he shall be of opinion that in the interests of good manners, decorum, or the public peace it is fitting to do so. He examines the claims of persons who desire to be presented at Court. He has under him a Vice-Chamberlain, who is also a Privy Councillor.—[Tomlins, *h.t.*; Bell, *Dictionary*, *h.t.*]

Chamberlain (The Lord Great) of England.—A high officer of State. He is Governor of the Palace of Westminster. The Gentleman Usher of the Black Rod and the Yeoman Usher are under his authority. The office is hereditary; and when it falls among heirs-female, they may execute it by a deputy, who must be in degree not inferior to a knight (*ex parte Burrell, etc.*, 1781, 2 Bro. P. C. 146, 8vo ed.).—[Tomlins, *Dictionary*, *h.t.*; Wharton, *Dictionary*. *h.t.*; Bell, *Dictionary*, *h.t.*]

Champarty or **Champerty** (Campi partitio).—A bargain entered into by a party to a suit, and one who has no interest in it, whereby the latter (champertor) undertakes to carry on the suit at his own expense, on condition that, if successful, he and the litigant divide the subject of the suit between them. By the common law of England and by Statute such a bargain is illegal, and punishable by fine and imprisonment (3 Edw. I. c. 25; 13 Edw. I. c. 49; 32 Henry VIII. c. 9. See Wharton, *Lex.*).

Champert.—A gift taken by a great man or a judge from any person for furthering a wrongous action, or delaying a just one (Skene, *De Verborum Significatione*).

Chancellor.—There seems little doubt that the word chancellor is derived from the Latin *cancellarius*, the doorkeeper or guardian of the *cancelli*, that is, the gratings or railings of the theatre, the barriers used in the public games, or the bar of the Forum. The term was afterwards applied to the clerk or scribe who sat for the transaction of business in his chancery, or office screened off from the public court of law. Still later, the *cancellarius* became the adviser and often the confessor and conscience-keeper of the emperors, both Western and Eastern; while similar officials were appointed by the papal *curia*, by the Episcopal dioceses, by many of the monasteries, and by the universities. Under the Carolingian monarchs the chancellor was simply one of the royal notaries, a body presided over by the arch-chancellor, to whom was committed the custody of the royal seal. At that period, too, there existed another important official called the arch-chaplain, or king's chief cleric; but the king's chancery and his chapel soon came to be merged and united under a single official, thenceforth known as the chancellor. In England this official is expressly mentioned for the first time in the reign of Edward the Confessor, although his office had doubtless existed as far back as the time of Dunstan. For the functions of the English Lord Chancellor as "guardian of all infants, idiots, and lunatics," "keeper of the king's conscience," etc., the reader is referred to the pages of Blackstone; but it is of chief importance to remember that the English Chancellor, in directing the king how to exercise his royal prerogative of entertaining appeals from the law-courts, became the founder of the "equity" system of jurisprudence, as opposed to the "common law." In

the history of Scotland the Chancellor appears for the first time in the reign of Alexander I., as a witness of charters, at the beginning of the 12th century, when royal fiefs and charters were first introduced. He is also the official who, by the king's writ, affords redress to appellants who have been wronged by the courts of law or by persons in power. But a marked divergence soon takes place between the English and the Scottish Chancellor. Both were indeed almost invariably Churchmen down to the Reformation, but the English Chancellor derived his notions of equity mainly from the canon law, a system differing widely from the common law; while in Scotland he was largely guided by the civil law of Rome, an enlightened system which he had learned in the great continental universities, and which gradually came to be adopted as the basis of the common law of Scotland. Moreover, from the time of Edward I., and particularly from that of Edward III., the English Chancellor presided over the Court of Chancery, with its many-sided equitable jurisdiction, while the Scottish Chancellor held no separate court of his own. Hence the antagonism of law and equity in England, and hence the absence of such antagonism in Scotland. As in England, the Lord Chancellor of Scotland was Keeper of the Great Seal; but when this function was transferred to the English Lord Chancellor by the Treaty of Union, the Scottish office of Chancellor ceased to exist. The official business of sealing writs is, however, still transacted by the Chancery department in Scotland, while the English Lord Chancellor has no jurisdiction over Scotland, except as President of the House of Lords when sitting as a court of appeal in Scottish cases. It remains to add a few of the multifarious rights and duties of the Scottish Chancellors, as gleaned from the Scottish Acts, the Register of the Privy Council, and other sources. He is at the head of the law: he receives appeals to Parliament; he grants seisins from Chancery: he intimates statutes to Justices and Sheriffs; he writes letters in the king's name, under the king's great seal; he visits royal hospitals; he usually sits thrice annually with certain members of the Three Estates to hear causes remitted to him by the king's council: he licenses the clergy to travel abroad: he collects the king's dues; he is to preside in the Court of Session (1532): he is to sit weekly to treat of matters concerning the common weal; it is treason to slay him (1546); he is censor of the press (1574): the election of commissioners for shires must be reported to him; he is to admit scribes and notaries to office; he touches Acts of Parliament with the sceptre; he attends constantly on the king; he grants leave to members of Parliament to speak (James I. 1607); he presides over the Lords of the Articles and over the Privy Council; he takes precedence over all other officers of State, except in Exchequer when the principal treasurer is present; he is a member of all committees of Parliament; and lastly, he is entitled to have the great seal carried before him, and to have the first place at all public meetings. As to the mode of his appointment, it may suffice to state that, while nominally elected by Parliament, he was really, as a rule, appointed by the king. Thus in 1543 he is appointed by the regent and the Lords of the Articles; in 1584 he is nominated by the king and approved by Parliament; and in 1641 he is appointed by the king, with the advice of Parliament. And so, too, he is nominally responsible to Parliament as well as to the king, but it need hardly be said that of his ministerial responsibility, in the modern sense, there is no trace.—[See Stubbs, *Constitutional History and Select Charters*: Pollock and Maitland, *History of English Law*; Hill Burton, *History of Scotland*; *The Scottish Acts of Parliament*; *Register of the Privy Council*, etc.]

Chancellor of Jury.—The chancellor, preses, or foreman of the jury is one of their number elected by themselves, after they have been sworn, orally to announce the verdict (54 Geo. III. c. 67). Written verdicts, now practically obsolete, are subscribed by the chancellor and the clerk of the jury, also one of their own number appointed by themselves, and handed by the chancellor to the proper officer of Court. The chancellor is chosen by a majority of the jurors. In civil cases, it is provided by 55 Geo. III. c. 42, s. 33, that in case of an equality of votes the juror first sworn shall have a double vote. In criminal cases, a verdict by a majority may be returned at any time: but if the jury are not unanimous, the chancellor must announce the fact, so that an entry thereof may be made in the Record (6 Geo. IV. c. 22, s. 20.—[See Hume, ii. 426; Alison, ii. 639; Macdonald, 500.]

Chancery, Director of.—The Director of Chancery is the official charged with the duty of recording, in books kept for the purpose, decrees of service pronounced by the Sheriff of Chancery and Sheriffs of Counties. After decree has been pronounced, the proceedings are transmitted, on the application of the petitioner for service, to the office of the Director of Chancery; and when the decree has been recorded and authenticated, an extract is prepared and delivered to the party; and where an heir is served to an ancestor in several separate estates in the same petition, separate extracts may be obtained applicable to one or more of said estates, provided a prayer to that effect is inserted in the petition for service. The decree of service so recorded and extracted has the full legal effect of a service duly retoured to Chancery, and is equivalent to the retour of a service under the brieve of inquest, and the extract of such decree is equivalent to the certified extract of the retour, according to the law and practice existing prior to 1847. A decree of service so recorded and extracted can only be set aside by a process of reduction in the Court of Session. An index and abridgment of the Record of Services is printed and published annually.

Crown writs, after being revised and approved by the Sheriff of Chancery, are officially transmitted to the office of the Director of Chancery, and are there engrossed and signed by the Director of Chancery, or his depute or substitute, and the writ, when signed, is recorded, and afterwards delivered to the party applying for the same. It is not now necessary to affix the Great Seal or other appropriate seal, unless the receiver of the writ requires it. Charters, precepts, and other writs by progress having been rendered incompetent by the Conveyancing Act of 1874, the only Crown charters or writs which now pass through the office are original charters, such as charters of incorporation, gifts of bastardy and *ultima hæres*, charters of novodamus, and precepts or writs of *clare constat* from Chancery. The latter have fallen into disuse, as they are granted only after a service, and the title of an heir with a decree of service can now be completed by recording the decree, or a notarial instrument expede thereon.

The commissions of the Lord Advocate and Solicitor-General, the Lord High Commissioner to the General Assembly of the Church of Scotland, and other commissions passing the Great Seal, are issued by the Director of Chancery, as well as Government commissions of inquiry, brieves of terce and division, tutory, and insanity. The commissions of the Sheriff-Deputes of Scotland are also recorded in the office of the Director of Chancery, and he is keeper of the Quarter Seal, otherwise

called the Testimonial of the Great Seal. The writs passing this seal are: (1) letters of tutory in favour of tutors-at-law, (2) letters of curatory, (3) letters of tutory-dative, (4) gifts of *ultima hæres*, bastardy, and forfeiture. Duplicates of deeds by and in favour of the Board of Trade, the Commissioners of H.M. Works, and the Commissioners of H.M. Woods and Forests, are deposited in the Chancery Office, and an abstract of them recorded there.

Chancery, Sheriff of.—The office of Sheriff of Chancery was created by the Service of Heirs Act, 1847 (10 & 11 Vict. c. 47), the provisions of which were afterwards re-enacted with considerable alterations and additions by the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101), the qualifications for the office being the same as those necessary for appointment as Sheriff of a county in Scotland.

The Act of 1847 provided, that from 15th November 1847 the practice of issuing brieves from Chancery for the service of heirs should cease, and that from and after that date every person desirous of being served heir to a person deceased, whether in general or special, and in whatever character, should, instead of applying as formerly for a brieve from Chancery, present a petition of service to the Sheriff in the manner provided by the Act. In the case of a general service, the petition may be presented to the Sheriff of the county within which the deceased had at the time of his death his ordinary or principal domicile, or to the Sheriff of Chancery; and if at the time of his death the deceased had his domicile furth of Scotland, the petition must be presented to the Sheriff of Chancery. In the case of a special service, the petition may be presented either to the Sheriff of the county within whose jurisdiction the lands are situated, or to the Sheriff of Chancery; but where the lands are situated in more than one county, then the application must be to the Sheriff of Chancery. The jurisdiction of the Sheriff of Chancery is therefore co-ordinate with that of the Sheriffs of counties, except where the domicile of the deceased was at the date of his death furth of Scotland, and where the lands are situated in more counties than one, in which cases it is privative. Having regard to the terms of sec. 10 of the Act of 1847, and the corresponding sec. in the Act of 1868, it is doubtful whether an application for special service to a person who has died abroad, though not domiciled furth of Scotland, can competently be presented to the Sheriff of the county in which the lands are situated. It is thought that the safer practice is in all such cases to present the petition to the Sheriff of Chancery.

Petitions for service must be signed by the petitioner, or by a mandatory specially authorised for the purpose, and are to be in the forms of the statutory schedules. Various particulars, which formerly required to be specified in the brieves from Chancery, are now dispensed with. Proof in application for service, which may be either documentary or parole, may be taken either before the Sheriff himself, or by the provost or bailies of any city or royal or parliamentary burgh, or by any justice of the peace or notary public, all of whom are authorised to act as commissioners without any special appointment, or by any commissioner whom the Sheriff may appoint. The parole evidence must be taken down in writing, and a full and complete inventory of the documents produced made out and certified by the Sheriff or his commissioner, and, on considering the evidence, the Sheriff, without the aid of a jury, pronounces decree, serving or refusing to serve, and his decree is equivalent to the verdict of the jury under the

brieve of inquest, according to the law and practice which prevailed prior to 1847. The usual practice is for the depositions of witnesses in applications for service to be taken before a commissioner, who reports them, along with the documents produced, to the Sheriff for his disposal. Where competing petitions are presented, they are proceeded with in the same way: and the Sheriff may, if he see fit, at any time before pronouncing decree in the first petition, sist procedure therein in the meantime, or conjoin the petitions, and thereafter proceed to take evidence, allowing each party a proof in chief with reference to his own claim, and a conjunct probation with reference to the claims of the other parties; and in pronouncing decree upon the competing petitions, he is directed at the same time to dispose of the question of expenses.

No person is entitled to appear and oppose a service before the Sheriff, who could not competently appear and oppose such service if the same were proceeding under the brieve of inquest according to the law and practice prior to 1847, and all objections must be presented in writing, and be disposed of by the Sheriff in a summary manner, either without or after an oral hearing.

The Sheriff of Chancery holds his Court in any court-room within the Parliament House at Edinburgh, which may be assigned by the Lords of Session for that purpose, or in any other place that may be so assigned; but since 1874 it has not been necessary for the Sheriff of Chancery to hold a Court for the disposal of unopposed petitions for service. These are now taken in chambers, and it is only in opposed petitions that the Sheriff sits in open Court.

By sec. 10 of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), the heir or disponee of a proprietor of lands, who was neither infeft nor served, but vested only with a personal right by virtue of the Act, or of any person acquiring a right from such heir or disponee, may make up his title by presenting to the Sheriff of Chancery, or the Sheriff of the county where the lands are situated, a petition, in the form of the statutory schedule, craving that he is entitled to be infeft in the said lands, and the petition proceeds in all respects as if it were a petition for special service.

Sec. 57 of the same Act also provided that from the passing of the Act the duties of the office of Presenter of Signatures should be discharged by the Sheriff of Chancery; but as charters by progress have been abolished by the same Statute, and the number of Crown writs to be adjusted is in consequence very small, the additional duties thus imposed are by no means onerous. See SERVICE OF HEIRS; APPEAL FROM SHERIFF OF CHANCERY.

Character of Panel, etc.—Evidence as to the character of an accused person may be led with one of two objects: (1) as having a bearing on the question of his guilt or innocence; (2) as an element in determining the degree of punishment which ought to be awarded, his guilt having been admitted or proved.

1. *Where Evidence of Character is led to affect the Question of Guilt or Innocence.*—It is almost unnecessary to observe that evidence as to character can only have weight in doubtful cases. Where the proof is clear and unambiguous that a man has committed a crime, evidence of prior good character is useless. If, however, the proof is not conclusive one way or another, or if, where a series of facts are established or admitted, the only question remaining is the *intent* of the accused in acting in the way he did, then evidence as to

character is of great importance. To be of any value, the evidence must be as to *general* character. Evidence that a man acted in a certain way on a particular occasion is valueless, for even the worst criminal might be able to prove that occasionally he acted as an honest man. The evidence, however, though general, ought to have reference to the particular crime charged; as, for instance, if a man is accused of assault, that he is invariably peaceable and inoffensive; if he is accused of theft, that he has the reputation of being an honest man. (1) *The prosecutor*, as a general rule, cannot, during his proof, lead evidence to show that the accused is a man of bad character. He will not be allowed to lead evidence to give him a basis for the argument that because the accused is a man of bad character the probability is that he committed the crime libelled. If, however, the accused cross-examines the Crown witnesses with the object of establishing his good character, or with the object of laying a foundation for the evidence of his own witnesses on this point, it is competent for the prosecutor, before closing his proof, to lead rebutting evidence. In the case of certain crimes, moreover, where evidence of character is important, it is competent both for prosecutor and accused to adduce such evidence. Thus, in cases of homicide in *chaude melle*, or in charges of assault, the prosecutor may prove that the accused is a man of passionate nature and violent temper. He may also lead evidence to establish that recent acts of aggression had been committed by the accused upon his victim, and he may do this without notice to the accused. If, however, remote acts of violence are to be established and founded on by the Crown, previous malice must be libelled. (2) *The accused* may always lead evidence of good character. It may be noted here that the panel has also the privilege in certain cases of attacking the characters of the persons who have been injured by him. The accused, however, must always give notice of such intention (*Brown*, 1836, 1 Swin. 293). He may thus, in a case of assault, prove that the injured party was quarrelsome (*Blair*, 1836, Bell's *Notes*, 294; *Irving*, 1838, 2 Swin. 109). It is incompetent, however, to prove specific acts of violence committed by the injured party (*Shields* or *Fletcher*, 1846, Ark. 171). In cases of rape, the panel may, on notice, cross-examine and lead evidence with the object of showing that, immediately prior to the act in question, the woman was a person of loose morals (*Reid*, 1861, 4 Irv. 124; *Forsyth*, 1866, 5 Irv. 249). It has not been decided whether it is competent to prove acts of intercourse with other men (see *M'Farlane*, 1834, 6 S. J. 321; *Allan*, 1842, 1 Broun, 500; *Blair*, 1844, 2 Broun, 167). The accused, however, may prove that the woman had voluntary connection with him shortly before (*Blair, ut supra*). As to conduct subsequent to the injury, the Court allowed the accused in the case of *Leitch* (1838, Bell's *Notes*, 84), to prove that the woman had been guilty of an immoral act on the evening of the day of the alleged rape, but refused to admit evidence of subsequent immorality.

2. *Where Evidence of Character is led to affect the Sentence.*—If the accused pleads guilty, or if the charge is proven after trial, the prosecutor is entitled to found on the previous convictions against the accused which have been libelled, while the accused may lead evidence of previous good character. In practice, no parole evidence is led on either side, unless it be necessary for the prosecutor to prove a previous conviction which the accused has challenged. The accused frequently produces and founds upon documentary evidence as to previous character, such as testimonials or certificates of good character from clergymen or well-known citizens.—[Hume, ii. 413; Alison, ii. 629; Bell's *Notes*, 294; Burnett, 591; Dickson on

Evidence, i. s. 15; Macdonald, 470; Anderson, *Crim. Law*, 247; Taylor on *Evidence*, i. 248.] See AGGRAVATION OF CRIME; CRIMINAL PROSECUTION; PREVIOUS CONVICTION.

Character of the Parties in Civil Actions.—Evidence that a person has a good or a bad character is irrelevant, and therefore inadmissible; save when his character is itself the fact in issue, or so intimately connected therewith as to throw light upon it, or upon the *quantum* of damages. Thus, in an action of damages for defamation, the pursuer may lead evidence in support of his character (*M'Neill*, 1847, 10 D. 15); and the defender may impugn it, when thus "set up," or where he has attacked it on record, or taken a counter-issue of *veritas convicii* (*Bryson*, 1844, 6 D. 363; *M'Neill*, *ut supra*; *M'Kellar*, 1859, 21 D. 222; *Wilson*, 1861, 24 D. 67). Such a counter-issue will not be allowed unless it come up to the slander alleged (*Bertram*, 1885, 12 R. 798; see *Henderson*, 1895, 23 R. 25). Where the issues proposed by a pursuer were limited to certain specific acts of dishonesty, and the defender, in support of his plea of *veritas*, specified other like acts, and proposed counter-issues upon all the acts, it was held that the scope of the counter-issues must be limited by that of the issues; but it was observed that this limitation did not preclude the defender from cross-examining the pursuer on the matters which the former desired to make the subject of counter-issues (*Powell*, 1896, 33 S. L. R. 380). A defender charged with slander is not entitled, without a counter-issue, to prove the truth of the defamatory statements, in whole or part, in mitigation of damages. He may, however, lay before the jury the general circumstances under which the slander was uttered (*Paul*, 1884, 11 R. 460; *Browne*, 1889, 16 R. 368; and see *Ogilvy*, 1836, 14 S. 729, 1080. In *Cunningham*, 1889, 16 R. 383, such evidence was admitted in aggravation of damages). It appears that in an action of damages for seduction, the pursuer's character, at all events where it is impugned, may be supported by evidence (*Walker*, 1857, 19 D. 340). In England, the previous general character of a seduced wife or daughter may be impeached either by general evidence of misconduct, or proof of particular acts, prior to the alleged seduction (Best, *Evidence*, s. 258; Taylor, *Evidence*, s. 356–7); and, on the same principle, evidence of a husband's profligate habits during marriage has been admitted in an action of damages at his instance against the paramour (*Baillie*, 1818, 1 Murray, 330; *Brodie*, 1834, 12 S. 941; Fraser, *H. & W.* ii. 1205). So, too, in an action of reparation for bodily injuries, questions as to the pursuer's character, as affecting the *quantum* of damages, were admitted without notice (*Butchart*, 1859, 22 D. 184; cf. *Brash*, 1845, 7 D. 539).

The defender's character is held not to be in issue; and, accordingly, it may not be either supported or impugned. But an exception to this principle has been recognised in matrimonial causes (*Whyte*, 1884, 11 R. 710; cf. *A.* v. *B.* 1895, 22 R. 402).

Dickson on *Evidence*, ss. 6–18; Kirkpatrick, *Evidence*, ss. 88–9; Stephen, *Evidence*, art. 55 and note 25: Taylor, *Evidence*, s. 349 *et seq.* See also BEST EVIDENCE (2); SLANDER; REPARATION.

Character to Servant.—A master is not legally bound to give a certificate of character to a servant at the close of his term of service. He is entitled to refuse to make any statement or to answer questions as to the skill or honesty of his employee (*Fell*, 12 Dec. 1809,

F. C.); but if a master does give a certificate of character, it must be true to the best of the master's knowledge (*Christian*, 1818, 1 Murray, 427); for if a master knowingly give an untrue certificate of character to a servant, he would be liable in damages, on the one hand, to the servant if the character given were unfavourable (*Anderson*, 1818, 1 Murray, 429), and, on the other hand, to the person who might take the servant into his employment on the faith of a good character given him by his former master (*Wilkin*, 1854, 15 C. B. 192).

But when a master is asked, by anyone having an interest to ask it, for a servant's character, any statement made by him is privileged, and a servant seeking to recover damages from his master for giving him an untrue character must make a general averment of malice (*Laidlaw*, 1890, 17 R. 394); but see *Farquhar*, 1890, 17 R. 716, where action was dismissed because there were no specific averments of malice). There are cases in which it has been held that a master is entitled ultroniously to make statements to parties interested regarding the character of a servant (*Rogers*, 1803, 3 B. & P. 592; *Farquhar, ut supra*; *Hunt*, L. R. 1891, 2 Q. B. 341).

In England, it has been held that a master is entitled to take steps to induce a person proposing to employ his servant to inquire as to his character, and that communications made *bonâ fide* in answer to such inquiries would be privileged (*Pattison*, 1828, 8 B. & C. 584). Where a servant had obtained a situation on the faith of a character given by a former master, the latter communicated to the new master certain facts in regard to the servant which had come to his knowledge since the character was granted, it was held that the communication was privileged, and that it was the duty of the master to make it (*Gardener*, 1849, 18 L. J. Q. B. 334).

Accusations of improper conduct on the part of a servant made by a master (1) to the servant when he dismissed her, (2) to her parents, and (3) in a court, as the reason for the dismissal, were held to be privileged statements (*Watson*, 1862, 24 D. 494; *Newall*, 1896, 3 S. L. T. 414). On the other hand, where a visitor in a hotel accused a servant of having stolen his whisky when she cleaned his bedroom, and afterwards repeated the accusation to the servant's master, it was held that the statement was not privileged (*Reid*, 1893, 20 R. 712).

A master has been held liable for maliciously defacing the written character of a servant granted by a former master, by writing upon it a disparaging statement (*Wennhak*, 1888, L. R. 20 Q. B. D. 635).

By Act 32 Geo. III. c. 56, certain penalties are imposed upon persons giving or using false characters. A person who pretends to have been the master of a servant seeking employment, and as such, either verbally or in writing, gives him a false character, is liable in a penalty of £20. A master giving in writing a character incorrect in certain particulars, is liable in the same penalty. A person offering himself for employment and falsely stating that he has or has not been in certain service, or using a false certificate of character, or altering a certificate which he has received from a former master, is liable in a penalty of £20. It has been doubted whether this Act applies to Scotland.—[Fraser on *Master and Servant*, 129; Bell, *Prin.* s. 188; Cooper on *Defamation*, 176.] See SLANDER; PRIVILEGE.

Charge.—A charge is the formal written demand or requisition at the instance of a creditor, made by authority of the Sovereign or the Sheriff

of a county, calling on the debtor to pay a debt or to perform an obligation within a specified time, under pain of certain consequences.

The warrant for a charge may be contained in (1) extract of a decree of Court decerning for payment of a debt or ordaining performance of a certain act (see EXTRACT DECREE): (2) extract of a deed, decree arbitral, bond, protest of a bill, or any other obligation or document on which execution may competently proceed, recorded in the books of a competent Court (see REGISTRATION FOR EXECUTION) (Debtors (Scotland) Act, 1838; A. S. 24th December 1838, s. 1; A. S. 24th January 1839; Land Registers (Scotland) Act, 1868: Registered Writs Execution (Scotland) Act, 1877; A. S. 8th January 1881; Sheriff Courts (Scotland) Extracts Act, 1892); or (3) Letters of Horning passing the signet. These letters were formerly necessary as a warrant for a charge, but although still competent, they are of very rare occurrence, being practically superseded by extracts under the Statutes above mentioned (see HORNING). The charge on Court of Session extracts is executed by a messenger-at-arms and on Sheriff Court extracts by a messenger-at-arms or sheriff-officer. Authority may be given by the Court of Session for execution by a sheriff-officer in districts where there is no messenger-at-arms (*North of Scotland Bank*, 1891, 18 R. 460).

A charge is held to be diligence, and must be in all respects in conformity with the warrant on which it proceeds. Any irregularity or informality may lead to suspension of the proceedings and to the charger being found liable in damages (*Gibb*, 1873, 11 M. 705), but irregularities may sometimes be cured by the withdrawal of the charge (*Clark*, 1875, 3 R. 166: see Glegg on *Reparation*, 169).

The following particulars are contained in the charge:—(1) The name of the messenger or officer executing it. (2) A reference to the warrant on which it proceeds, specifying the nature and date of extract and of the decree, or the document whereon it proceeds, with the parties thereto. As to error in specifying the date, see *Campbell*, 1849, 12 D. 177; *Graham*, 1875, 2 R. 972. An objection that the execution of charge did not give the date of the document on which the extract proceeded, was repelled (*Dimpsey*, 1863, 1 M. 1126): and it was held not necessary to give the date of extracting the decree (*Williamson*, 1866, 4 M. 1091). (3) The party at whose instance the charge is given. It may be given either at the instance of the original creditor, or at the instance of a person acquiring right to the warrant, who has first obtained a fiat on the extract, which is granted by the Clerk of the Bills or the Sheriff Clerk, as the case may be, upon a minute craving authority endorsed thereon, and production of the assignation or other evidence of his title (Debtors (Scotland) Act, 1838, ss. 7 and 12; *Jamieson*, 1853, 15 D. 414; *Gillespie*, 1894, 2 S. L. T. 291). If the charge is at the instance of a descriptive firm, the names of the partners must be added. A foreigner may give a charge without a mandatory (*Ross*, 1849, 11 D. 984). (4) The name and designation of the debtor or obligant. These must be correctly set forth, and if the debtor is only liable in a special character, such must be stated (*Campbell*, 1844, 6 D. 1030; *Spalding*, 1883, 10 R. 1092; *Brown*, 1884, 12 R. 340; *Cruickshank*, 1888, 15 R. 326). Individual partners of a company may be charged for a company debt on a decree against the company, although their names do not appear on the warrant (*Knox*, 1847, 10 D. 50; Partnership Act, 1890, s. 4). If the debtor is a minor, his tutors and curators must be charged edictally along with him. (5) A statement that the charge is made in Her Majesty's name and authority, or by authority of the Sheriff, as the case may be. (6) What the

party is charged to do; if to pay money, the sum, interest, and expenses; if to fulfil an obligation, or to perform an act, such must be distinctly specified as in the warrant (*Hanna*, 2nd March 1849, 11 D. 941; *Henderson*, 1871, 10 M. 104; *Hendry*, 27th February 1878, 5 R. 687). If any sum has been paid to account since the decree, credit therefor must be given, or a charge may be given under deduction of any sum that may be obtained from other sources (*Richan*, 1832, 11 S. 237). (7) The party to whom payment is to be made (*Campbell*, 1849, 12 D. 177). (8) The time within which the charge has to be obeyed. The *induciæ* vary according to the nature of the warrant, and are as follows: (*a*) On a Court of Session decree, fifteen days if the debtor is within Scotland, forty days if the debtor is in Orkney or Shetland, and fourteen days if the debtor is furth of Scotland (A. S. 24th December 1838; Act 1685, c. 56; Court of Session Act, 1868, s. 14). (*b*) On an extract registered protest of a bill, six days: or (in the case only of a Court of Session protest) against a party furth of Scotland, fourteen days; or in Orkney and Shetland, forty days (Act 1681, c. 86; 1685, c. 56; Court of Session Act, 1868, s. 14. (*c*) On an extract of a deed which bears a consent to registration for execution on a six days' charge or in the equivalent statutory form, six days, or if furth of Scotland, fourteen days (Titles to Land Consolidation (Scotland) Act, 1868, s. 138; Court of Session Act, 1868, s. 14. (*d*) On an extract of a deed recorded in the Register of Sasines with a clause of consent and warrant of registration for execution in statutory form, six days, or if furth of Scotland, twenty-one days (Lands Registers (Scotland) Act, 1868, s. 12). (*e*) On a decree of the Teind Court, ten days, or if debtor furth of Scotland, sixty days (A. S. 4th March 1840). (*f*) On a decree of the Exchequer Court, six days (Court of Exchequer Act, 1856, s. 28). (*g*) On a decree of the ordinary Sheriff Court, seven days, or against a party in Orkney or Scotland or furth of Scotland, fourteen days (Sheriff Courts (Scotland) Act, 1876, ss. 8 and 9; Sheriff Courts (Scotland) Extracts Act, 1892, s. 7). (*h*) On a decree of the Debts Recovery Court or Small Debt Court, ten days (Debts Recovery Act, 1867, s. 9; Small Debt Act, 1837, s. 13). (*i*) On a decree of removing, forty-eight hours (A. S. 27th January 1830; Sheriff Courts (Scotland) Extracts Act, 1892, s. 7). (*j*) On a certificate registered under the Judgments Extension Act, 1868, fifteen days, or if against a party in Orkney or Shetland, forty days, or a party furth of Scotland, possibly fourteen days (A. S. 11th July 1871; A. S. 7th March 1883; Act 1685, c. 56; Court of Session Act, 1868, s. 14). A charger may be liable in damages if a charge of the proper number of days is not given (*Smith*, 1882, 10 R. 291). (9) A statement of the consequence of failure, namely, poinding and, where it may be competent, imprisonment (*Gill*, 1894 (Sheriff Court, Aberdeen), 2 S. L. T. 191). (10) The date on which the charge is given (*Beattie*, 1844, 6 D. 1088). (11) The name of the witness to the charge.

The charge, signed by the officer, may be executed in one or other of the following ways: (1) by the officer delivering it to the debtor personally; (2) where the debtor cannot be found personally after inquiry, by the officer leaving it with a person in his dwelling-place (Act 1540, c. 75); (3) when admittance to the dwelling-house cannot be obtained after giving six audible knocks, by the officer affixing the charge to the door of the house, or putting it in the keyhole (Act 1540, c. 75); (4) execution against a company is effected by delivering the charge to a partner or servant within its place of business; (5) if the debtor is furth of Scotland, by delivering the charge at the office of the Keeper of Edictal Citations at Edinburgh (6 Geo. IV. c 120, s. 51; A. S. 24th December 1838, s. 7; Court of Session Act, 1850, s. 22).

In the case of Sheriff Court extracts, if the debtor has a known residence or place of business in England or Ireland, a copy of the charge has to be posted to him in a registered letter (Sheriff Courts (Scotland) Act, 1876, s. 9). In all cases one witness is necessary except for a charge under the Small Debt Act, which can be given without a witness (Debtors (Scotland) Act, 1838, s. 32, 9 & 10 Vict. c. 67; Small Debt Amendment Act, 1889, s. 11). A certificate or execution which is practically a copy of the charge served on the debtor, put in the form of a narrative, and which must contain the same particulars, states in what manner the charge was given, and is signed by the officer and the witness (Act 1686, c. 4; Debtors (Scotland) Act, 1838, ss. 3 & 32; A. S. 24th December 1838; *Beattie*, 1844, 6 D. 1088).

A Sheriff Court extract, when it is to be executed outwith the county from which it is issued, requires to be endorsed by the Sheriff Clerk of the county in which it is to be used, or by the Bill Chamber Clerk (Sheriff Courts Act, 1838, s. 13). This does not apply, however, to decrees of the Small Debt Court (Small Debt Amendment Act, 1889, s. 11).

A creditor in a heritable security may obtain warrant in the Bill Chamber or the Sheriff Court to charge a person against whom the personal obligation in the security has transmitted (Conveyancing (Scotland) Act, 1874, s. 47).

An expired charge is essential before the diligence of poinding or imprisonment can be carried out. A charge is not necessary previous to arrestment or inhibition. The following consequences result from a charge: (1) On expiry of the days of charge without implement, (*a*) if the charge is to pay a sum of money, a poinding of the debtor's moveable effects may be carried out, and, where competent, warrant to imprison may be obtained; (*b*) if the decree is one *ad factum prastandum*, warrant to imprison may be obtained. In Small Debt cases, when the debtor has been personally present at the pronouncing of judgment, further diligence may proceed on the lapse of ten days after the decree, without a charge (Small Debt Act, 1837, s. 13; *Shiell*, 1871, 10 M. 58). (2) In cases in which imprisonment is rendered incompetent by the Debtors (Scotland) Act, 1880, insolvency, concurring with the expiry of the days of charge without payment, constitutes notour bankruptcy, and in other cases an expired charge followed by other diligence has the same effect (see NOTOUR BANKRUPTCY). (3) Upon registration of the execution of charge in the Register of Hornings, the debt and past interest are accumulated into a capital sum, on which interest thereafter runs (Debtors (Scotland) Act, 1838, s. 10). (4) A decree in absence acquires the privileges of a decree *in foro* upon the lapse of six months after the expiry of a charge if the action has been personally served, or appearance entered or a personal charge given.

An illegal, irregular, or defective charge, or threatened charge, may be suspended by petition to the Bill Chamber. Where a charge has been given upon a registered bond or other obligation for a sum not exceeding £25, exclusive of interest and expenses, suspension is competent in the Sheriff Court of the domicile of the person charged (Sheriff Courts Act, 1838, s. 19; and A. S. 10th July 1839, s. 116.—[Campbell on *Citation and Diligence*, 179: Mackay, *Manual*, 7; Dove Wilson, *Sheriff Court Practice*, 332; *Juridical Styles*, iii. 329; Bell, *Conveyancing*, i. 523.] See SUSPENSION.

Charge on Letters of Horning.—See HORNING.

Charge against Superiors.—See CONFIRMATION; ADJUDICATION.

Chargé d'Affaires.—A chargé d'affaires is a diplomatic agent of the fourth class (see AMBASSADOR), who is accredited by the Foreign Minister of the State sending him to the Foreign Minister of the State receiving. Chargés d'affaires are either chargés d'affaires *ad hoc*, those who are sent as permanent representatives of their State; or chargés d'affaires *per interim*, those who are substituted for the proper Minister during his absence. (For privileges of chargés d'affaires, see AMBASSADOR.)

[G. F. von Martens, *Law of Nations*, 211; Wheaton, *International Law*, Boyd's edition, 320.]

Charge to Jury.—There is no general rule for the regulation of the judge in charging the jury. He is supposed to review the evidence on both sides, selecting the most important portions of it. Further, he explains to the jury the legal aspect of the case, setting forth precisely and without ambiguity the questions of law involved, and directs the jury how such questions are to be dealt with by them in arriving at their verdict. If either party is of opinion that the judge has erred in stating the law, it is open to him to take exception to the legal matter as delivered by the judge. See BILL OF EXCEPTIONS.

Charitable Bequest.—See LEGACY; CHARITABLE TRUSTS; CY-PRÈS; NOBILE OFFICIUM.

Charitable Trusts.—The general principles of the law applicable to trusts for charitable purposes are, of course, the same as those applicable to other trusts, and will be dealt with under the title TRUST. Charitable trusts, however, are a branch of public trusts, and differ from private trusts in respect that their duration may be permanent. The legal meaning of the word "charitable" in this connection is somewhat wider than the ordinary meaning of the word. It covers trusts which are not strictly eleemosynary in their nature. Thus a bequest for religious purposes is considered charitable (*White* [1893], 2 Ch. 41), so long as there is some benefit to the public intended (see *Cocks*, 1871, L. R. 12 Eq. 574). So also a trust for behoof of a corps of volunteers is charitable (*In re Lord Stratheden and Campbell* [1894], 3 Ch. 265; *In re Stephens*, W. N. 1892, 140); but a trust for the purpose of encouraging what is merely sport will not be treated as a charitable trust, and cannot be maintained in perpetuity (*In re Nottage* [1895], 2 Ch. 649; see also *in re Forcane* [1895], 2 Ch. 501).

Trust deeds for charitable purposes have always been more favourably treated by the Courts both in Scotland and England than trust deeds for other purposes. That is to say, the Court will take great pains to read a meaning into a trust deed for charitable purposes which is uncertain in its terms, or nearly inextricable in its provisions. "There has always been a latitude allowed to charitable bequests, so that, when the general intention is indicated, the Court will find the means of carrying the details into operation" (per L. Cranworth in *Mags. of Dundee*, *infra*, 3 Macq. 166). The leading example of the way in which the Court will build up a will

out of the most slender materials is to be found in the celebrated *Morgan* case (*Mags. of Dundee*, 1857, 19 D. 918; 1858, 20 D. (H. L.) 9, 3 Macq. 134). In this case, Mr. Morgan had left a number of testamentary writings, all more or less incomplete. Two of these were in the following terms:—"*Edinburgh, 10th October* 1842.—I hereby annul all hitherto written on the first, second, and third pages of this, and wish to establish in the town of Dundee, in the shire of Forfar [an hospital strictly in size, the management of the interior of said hospital in every way as Heriot's Hospital in Edinburgh is conducted], the inhabitants born and educated in Dundee to have the preference of the towns of Forfar, Arbroath, and Montrose, but inhabitants of any other county or town are excluded"; and "I hereby wish only one hundred boys to be admitted in the hospital at Dundee [and the structure of the house to be less than that of Heriot's Hospital], and to contain one hundred boys, in place of one hundred and eighty boys." The words in brackets in these two writings had been deleted, but were still legible, and the writings were holograph and signed by the testator. These writings the Court of Session looked on as "mere scrolls or jottings from which the deceased intended at some time or other to have a settlement made up" (per L. J. C. Hope, 19 D. 924); but the House of Lords held that they contained (even though the deleted words were ignored) a valid and effectual expression of the testator's intention to establish a hospital in Dundee for a hundred boys from the four towns mentioned, the inhabitants of Dundee to have a preference; that, besides receiving their education, the boys were to be lodged, clothed, and fed; and that the hospital was to be endowed as well as established (per L. Chancellor, 3 Macq. 153, 156; per L. Wensleydale, 171). The amount of money to be spent on the hospital was not specified in the testamentary writings, but it was held that as much of the testator's property as was necessary to found and endow such an establishment might be applied for that purpose (3 Macq. 159; Scheme of Administration approved, 1861, 23 D. 493. See also *Presbytery of Deer*, 1865, 3 M. 402; 1867, 5 M. (H. L.) 20).

The Court will also appoint trustees, or otherwise provide for the execution of the trust, where the testator has failed to do so (*Mags. of Dundee, Presbytery of Deer, ut supra*; *Murray*, 1891, 29 S. L. R. 173), and will not allow any slight error or ambiguity in the nomination of trustees to defeat the intentions of the truster (*Murdochs*, 1827, 6 S. 186; *Gordon's Hospital*, 1831, 9 S. 909; *Synod of Aberdeen*, 1847, 9 D. 745; *Trs. of Trinity Chapel*, 1893, 1 S. L. T. No. 113).

A trust deed for charitable purposes need not define the objects of the charity, but the selection of these may be left to the discretion of the trustees. A direction to apply the residue of the truster's estate "to such useful, benevolent, and charitable institutions" as the trustees might in their discretion think proper, is not void from uncertainty (*Cobb*, 1894, 21 R. 638); and a mere bequest of money to trustees "to be laid out on charities," will be upheld, and the choice of the beneficiaries left to the trustees (*Dundas*, 1837, 15 S. 427; *Miller*, 1836, 14 S. 555; 1837, 2 S. & M'L. 866; *Hill*, 1824, 3 S. 389; 1826, 2 W. & S. 80). But a discretionary power to select the charities is personal to the trustees upon whom it is conferred, and does not pass to assumed trustees, or to a trustee or judicial factor appointed by the Court (*Robbie*, 1893, 20 R. 358). It can, however, be exercised by a trustee in his testamentary writings (*Copinger*, 1877, 11 I. R. Eq. 429). In England, by the Conveyancing Act of 1881 (44 & 45 Vict. c. 41, s. 33), a trustee appointed by the Court has the same powers as if he had been originally appointed by the trust deed. A person to whom

money has been bequeathed to be administered by him for charitable purposes, is entitled to receive payment of the money without submitting a scheme of administration (*Lea*, 1887, 34 Ch. Div. 528).

The powers conferred upon charitable trustees in their trust deed will always be liberally construed by the Court, who will assist the trustees to adapt their administration, where necessary, so that the main intention of the founder of the charity may not be frustrated, and the trust may be administered to the best advantage (*Carnegie Park Orphanage*, 1892, 19 R. 605; *Allan*, 1876, 4 R. 162; *M'Culloch*, 1876, 3 R. 1182; *Turbyne*, 1875, 3 R. 10; *Caird*, 1874, 1 R. 529; *University of Aberdeen*, 1869, 7 M. 1087). Where, owing to change of circumstances, the principal object of a truster's charity has failed, the Court, as a Court of Equity, will select another object. So, also, it will vary the directions laid down by the truster for the administration of the trust where this is necessary in order that the real intention of the truster may be carried out. This subject will be dealt with under the title Cy-près. (See also Educational Endowments Act.)

The powers of trustees for charitable purposes are in general the same as those of other trustees. They can, like other trustees, obtain leave to sell the trust property where a sale has not been expressly forbidden in the trust deed, and where it is necessary for the proper carrying out of the trust purposes (*Simpson*, 1892, 19 R. 389; *Cameron*, 1881, 18 S. L. R. 585; *Downie*, 1879, 6 R. 1013; *Presbytery of Aberdeen*, 1860, 22 D. 1053). They have, however, what private trustees have not, a power at common law to grant feus of the trust estate (*Merchant Company of Edinburgh*, 1765, Mor. 5750; *Mags. of Elgin*, 1882, 10 R. 342; *Jamieson*, 1884, 21 S. L. R. 541), unless prohibited by the deed (*Anderson*, 1876, 3 R. 639). Where there is a prohibition against sale or alienation, it has been held incompetent for charitable trustees to grant a ninety-nine years' lease (*Petrie*, 1868, 7 M. 64).

With regard to their personal liability for the administration of the trust, charitable trustees are in a more favourable position than other trustees. So long as there is no *mala fides*, the Court will deal leniently with them in respect of mistakes in administration, and will not hold them personally liable (*Andrews*, 1886, 13 R. (H. L.) 69; *Attorney-General* v. *Corporation of Exeter*, 1826, 2 Russ, 54, per L. Eldon); but where difficulties arise in the course of their administration, charitable trustees should apply to the Court for instructions (*Andrews*, *ut supra*, per L. Chancellor, 77).

By the Trusts Act of 1867 (30 & 31 Vict. c. 97, s. 16), it is provided that "where in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of Court, by whom the same shall be finally adjusted and settled; and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to Her Majesty's Advocate, who shall be entitled to appear and intervene for the interests of the charity or the public interest" (see *Old Monkland School Board*, 1893, 21 R. 122). This provision does not apply to a scheme drawn up for the purpose of dividing a sum of money among charities in accordance with the truster's directions (*Macandrew*, 1868, 40 Jur. 398, 5 S. L. R. 504).

When a trustee succeeds *ex officio* to another trustee who was duly infeft in the trust estate, it is not necessary for him to complete a title to the estate, but he "shall be deemed and taken to have a valid and complete title by infeftment in the estate in the same manner and to the same effect

as if he had been named in the completed and recorded title, without the necessity of any deed of conveyance or other procedure" (37 & 38 Vict. c. 94, s. 45).

The heir-at-law or the executor of the founder of a charity has an interest to entitle him to see that the trust is properly administered (*M'Leish*, 1841, 3 D. 914; *Campbell*, 1824, 3 S. 126). So also any person who has an interest, either existing or contingent, in the proper administration of the trust, "has a good title to pursue all actions before the Court necessary for ascertaining and declaring the powers and duties of the trustees, and enforcing their execution" (per L. Cunningham in *Ross*, 1843, 5 D. 609). This title exists in persons who have no actual claim to benefit under the trust, but who might be selected as beneficiaries by the trustees in the exercise of their discretion. Thus parishioners who averred that they might be thrown out of employment and thus become "able-bodied poor," were held entitled to sue an action regarding a fund which had been bequeathed "for behoof of the poor of the parish" (*Liddle*, 1854, 16 D. 1075; see also *Carmont*, 1883, 10 R. 829; *Ross*, 1843, 5 D. 589½; 1846, 5 Bell's App. 37; 18 Jur. 386; *Mags. of Edinburgh*, 1851, 13 D. 1187; *Rooke* [1895], 1 Ch. 480; *Mackie*, 1896, 33 S. L. R. 479). But such persons, having an interest under a deed constituting a charitable trust, are not entitled to sue an action for the reduction of a later deed of the truster revoking the trust, on such a ground as fraud (*Addison*, 1870, 8 M. 909). Where money has been subscribed for a charitable purpose, and that purpose has failed, the money may be repaid to the subscribers if it is not impossible through lapse of time to identify the origin of the subscriptions, or if extraneous funds have not been immixed with the original subscriptions (*Moffat Working Men's Institute*, 1893, 1 S. L. T. No. 306; see *Bain*, 1849, 11 D. 1286; *Connell*, 1861, 23 D. 683; *Mitchell*, 1876, 5 R. 954).

The administration of a charitable trust is subject to the laws of the country in which the truster has directed it to be administered, and the Court will order the payment of the money to the trustee, leaving all questions as to the administration to be decided in accordance with the laws of that country (*Ferguson*, 1853, 15 D. 637; *Emery*, 1826, 1 Russ. & Mylne, 112; *Attorney-General* v. *Lepine*, 1818, 2 Swans. 181).

See TRUST; TRUSTEE.

Charter.—Although Erskine speaks of a charter as "that writing which contains the grant or transmission of the feudal right to the vassal," and divides charters granted by subject-superiors into those with an *a me* and those with a *de me* holding (Ersk. ii. 3. 19–20), the term charter is now used to signify the deed by which a new feudal fee is created, the deed disponing the lands contained in it to be held by the grantee *de me*, *i.e.* of the granter, whereas the deed transferring a feudal fee already created is called a disposition. The deed creating a new feudal fee is called a feu-charter when the lands are disponed in feu, and a blench-charter when the lands are disponed blench. See FEU-CHARTER. When the original charter to lands is lost, or is defective, or when it is agreed by parties to make alterations on the original conditions of the feu, the superior, whether Crown or subject, may grant a charter of *novodamus*, either to the original vassal or to his heir, or to a singular successor in the feu. In the narrative of the charter of *novodamus*, the cause of granting is set forth; and the clause of warrandice, at least if the superior intervenes only for the convenience of the grantee, should be from fact and deed only. In other

respects the charter of *novodamus* is like the fen-charter. See NOVODAMUS, CHARTER OF. The Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 4), renders it incompetent for a superior to grant any charter, precept, or other writ by progress, under this provision that nothing in the Act "shall prevent the granting of charters of *novodamus*, or precepts from Chancery, or of *clare constat*, or writs of acknowledgment." The Act of 1874 has accordingly rendered it incompetent to grant the following charters or writs by progress, which were in use prior to the commencement of the Act:—Charters or writs of resignation, charters of resignation and confirmation, charters or writs of confirmation, with or without precepts of *clare constat*, charters of adjudication, and charters of sale. These charters and writs by progress will be treated in dealing with the completion of a title to lands in favour of a grantee under a disposition.

Charter from Crown.—See CROWN CHARTER.

Charter Party.—The contract of affreightment may be, but rarely is, constituted parole. In some cases—commonly in the coasting trade—its conditions are to be found in notices given by the shipowner of the terms on which he carries, and these, if brought clearly home to the merchant, are binding on the latter (*Muir, Wood, & Co.*, 20 R. 602; *e.g. contra*, see *Macrae* (*Lightbody's Tr.*), 14 R. 4). In many others the contract is evidenced by a bill of lading, which then to a large extent is in truth a charter; but bills of lading, particularly because of their negotiable character, have incidents of their own, and are separately treated. A charter party, however, is not only the leading form of writing by which the contract is constituted, but is almost always used when it is one for the use of the whole ship. It is therefore now proposed, under reference to other articles, and to the general law applicable to mutual contracts, to state shortly the principles regulating the contract of affreightment.

Parties.—The parties are ordinarily the shipowner and a merchant or other person requiring the use of the ship. The master has authority to enter into charters for the use of the ship at a foreign port when the ship is seeking employment (see Carver on *Carriage of Goods by Sea*, 2nd ed., 43), but he cannot innovate a charter already made (*Strickland and Others*, 7 M. 400), though he can make arrangements in connection with its execution. Thus it has been held he cannot abandon a claim for demurrage, but can agree to give a certain extension of time for loading in return for abandonment by the merchant of his right to require the ship to go to extra ports to load (*Holman*, 5 R. 657).

Stamp.—The charter party must be stamped with a sixpenny stamp, and can be after-stamped even on payment of a penalty only within a month after execution (Stamp Act, 1891, ss. 49–51).

Construction.—The purport of the contract is generally to be ascertained in the usual way in the case of written contracts. Its terms, if unambiguous, are to be given effect to. So far as not excluded, the customs and usages of the trade, *e.g.* those prevailing at the ports of loading and discharge, are read into the written document, while, like other mercantile contracts, it is construed in a reasonable manner (for illustrative cases, see *The Curfew* (1891), P. 131; *The Nifa* (1892), P. 411). Again, the legal conditions implied in the contract of affreightment must be displaced by express provision, or they also will be held to form part of the bargain.

Contracts are in the ordinary case construed according to the *lex loci contractus*: but when they are to be wholly performed elsewhere, the law of the place of performance may be applied. In each case, however, the question by what law the parties have agreed the contract shall be construed is one to be gathered from the whole circumstances of the case and the terms of the contract (*In re Missouri S. S. Co.*, 42 Ch. D. 321). In contracts of affreightment the same rules apply, but the question is one of special difficulty. The contract may be made between a shipowner of one nationality and a merchant of another, for performance in countries to which neither belong. The mode in which the loading and discharge is to be conducted may of course be affected, not only by the customs, but by the law of the place of performance. In general, the law of the ship's flag will regulate the authority of the shipmaster to make the contract, if he has done so, or to deal with the goods in the course of the voyage (*Lloyd*, L. R. 1 Q. B. 115); and in the absence of other indications, the presumption, it is thought, is that the law of the flag regulates the contract. Where, however, an English merchant shipped goods in England to be carried to a Dutch port in a ship carrying the Dutch flag, but belonging to a company registered both in England and Holland, and the bill of lading was in English, it was held the law of England applied (*Chartered Mercantile Bank of India*, 10 Q. B. D. 521; see also *The Industrie* (1894), P. 58). In certain cases, *e.g.* as to the probative effect of statements in a bill of lading, the *lex fori* will rule (*Owners of "Immanuel,"* 15 R. 152).

By an Act known as the Harter Act, the United States have made special provision, restricting the extent to which shipowners can contract for freedom from liability for injury to cargo. In consequence of its terms, owners frequently insert in their shipping documents a provision that the contract is subject to the Act, and the English Courts have recently had occasion to consider how in these circumstances, with an English contract, the Act is to be interpreted (*Dobell & Co.* (1895), 2 Q. B. D. 408).

Demise.—In special cases, now rare, the owner parts with control and possession of the ship. The charterer takes his place, and he employs and pays the crew. In such a case, known as a demise, the owner, having lost possession, can claim no lien over the goods for freight. He incurs no legal obligation to those with whom the charterer contracts, and, subject to certain qualifications which do not now fall to be considered, none to third parties. The test whether the charter amounts to a demise or not is to be found in ascertaining if the shipowner has parted with possession of the ship, and ceased to control those who employ her (*Baumwoll* (1893), A. C. 8; cf. *Manchester Trust* (1895), 2 Q. B. 282, 539).

Ordinary Charters.—By the common forms of charter, the shipowner gives to the charterer the full use, or the use of a specified portion, of his ship to carry goods or passengers, which the charterer agrees to ship. Sometimes the charterer takes the ship for a period of time, agreeing to pay freight at so much a week or month. Sometimes the charter is for a voyage or voyages, and the freight is either a lump sum or calculated at so much per ton of cargo. In these cases the shipowner retains possession of the ship, and remains responsible to third parties for any injury his ship may do by the fault of the crew or others for whom he is responsible. The carriage of passengers, which is to some extent regulated by Statute, is not here dealt with. In time-charters there is generally provision made for the hire ceasing in the event of loss of time from deficiency of men or stores, break-down of machinery, or damage, etc., whereby the working of

the vessel is stopped for more than a very limited time. The effect of this clause has been considered in a recent case, to which reference may be made (*Hogarth*, 16 R. 599; (1891), A. C. 48).

Bills of Lading.—The charterer frequently wants the ship to load her with the goods of others, and he takes the shipowner bound to grant by his master bills of lading. Questions then arise how far these third parties have rights against the shipowner, and how far they are bound by the terms of the contract contained in the charter when these differ from, or are not incorporated in, the bill of lading. Such questions, and the cognate question how far the charter is incorporated in the bill by reference, have already been treated of (see BILL OF LADING). So far as the rights of the owners of cargo are not restricted by their contract with the charterers, or as evidenced by the bill of lading, they have a right of action for damage against the shipowner, either under the contract in the bill of lading, or, it is said, in respect of his or his servants' wrongful acts where the goods in their charge have been damaged (*Sandeman*, L. R. 2 Q. B. 86; *Hayn*, 4 C. P. D. 182; *Serraino & Sons* (1891), 1 Q. B. 283; *Manchester Trust, ut sup.*

Following on the charter, the charterer receives in ordinary course bills of lading. In some cases the latter contain conditions which differ from those in the charter. In such cases the general rule is that the charter regulates the contract, and the bill of lading is treated only as an acknowledgment for the goods put on board, or as evidencing the contract between the charterers and shippers under him. So, where the charter contained a negligence clause, and the bill of lading none, the shipowner was held entitled to found on the clause in a question with the charterer or a person standing in his shoes (*Delaurier*, 17 R. 167). Exactly the same principle has been applied where the opposite was the case, so as to make the ship liable for negligence not excluded by the charter, but covered by the bill of lading negligence clause (*Rodocanachi*, 18 Q. B. D. 67). If, however, it is clear that the parties meant to innovate the charter by the bill of lading, the change will be respected (see *Davidson*, 5 R. 706). A shipowner is not liable for goods not shipped, but for which the master has granted a bill of lading, as the master has no authority to do this (*M'Lean & Hope*, 9 M. (H. L.) 38). The owner may by bargain agree to be bound by the master's signature (*Lishman*, 19 Q. B. D. 333). Further, there is a heavy *onus* on the owner to show that the goods were not shipped, and he falls to prove this affirmatively (*Horsley*, 21 R. 410; *Smith & Co.* (1896), A. C. 70; rev. C. of S. 22 R. 350).

Obligations implied if Charter contain no Provision to contrary.—The charter in its simplest form may do no more than specify the name of the ship, and set forth the agreed-on voyage and freight therefor, though in fact it always somewhat amplifies the exceptions from liability of the ship. In such a case the greater part of the contract rests on implication, and it is necessary to consider the bargain the law makes for the parties.

The shipowner undertakes to proceed without delay to the port of loading, if not already there, and there load the agreed-on cargo. It is his duty to do so with reasonable speed, and, on arrival, to give notice to the charterers of his readiness to load. The cargo, in the absence of express provision, falls to be loaded in accordance with the usual custom of the port; and if there are more berths than one at which it is usual to load the cargo, the charterer has right to indicate to which he requires the ship to proceed, provided he selects one reasonably free. The charterer is under obligation to timeously furnish the agreed-on cargo, but he is not bound to have the cargo forward so soon that the ship may be able to take advantage

of any unforeseen circumstances whereby she would have been able to load out of her turn had the cargo arrived (*Little* (1896), A. C. 108). It has been held that a guarantee by the shipowner of carrying capacity is to be construed with reference to the particular cargo indicated by the charter as to be shipped (*M'Kill, &c.*, 14 App. Ca. 106).

The charterer has right to all carrying spaces in the ship, but not, in the absence of custom, to put cargo on deck (*Wills & Co.*, 21 R. 527).

The owner warrants that the ship is seaworthy when she sails, *i.e.* is reasonably fit—in both equipment and crew—to make the voyage contracted for, and suitable to carry the chartered cargo, and is liable for all loss due to breach of this warranty (*Steel & Craig*, 3 App. Ca. 72; *Gilroy* (1893), A. C. 56); cargo on ship *Maori King* (1895), 2 Q. B. D. 550). It is also an implied obligation that the ship shall proceed on and prosecute her voyage, without delay or deviation, by the usual route. If there is deviation, the ship is liable for all loss which might not have happened had there been no deviation (see this question discussed in *Donaldson Bros.*, 10 R. 413). The master has, however, considerable discretion as to the port to which he will take his ship in case of damage. So it was held that a Bristol ship, damaged on an outward voyage, having put back to Queenstown, had right to return to Bristol for repairs, without committing a breach of the implied obligation not to deviate (*Phelps* (1891), 1 Q. B. 605; *Caffin* (1895), 2 Q. B. 366). But a general liberty to call at ports, even though couched in wide terms, will not justify a ship practically departing from the voyage contemplated by the shipping contract, and calling at a port outside that voyage, altogether (*Glynn* (1893), A. C. 351).

The owner, if a common carrier, in the absence of express contract, practically insures the goods, as he undertakes to deliver them safe, the act of God and the Queen's enemies alone excepted. Even if not a common carrier, there is authority for saying that his obligation is the same so far as not limited by contract (*Liver Alkali Co.*, L. R. 9 Ex. 338; *Nugent*, L. R. 1 C. P. D. 19, 423; *Hill* (1895), 2 Q. B. 371, 713).

Most charters, however, contain exceptions which at least free the owner from liability if he has used reasonable care.

The owner is in no case liable for damage due to inherent vice or weakness in the goods, or to the defective manner in which they have been packed by the merchant before shipment; while by Statute he is relieved from liability in the case of loss due to a pilot compulsorily employed (Merchant Shipping Act, 1894, s. 633), and his liability limited to a certain amount in certain cases (Merchant Shipping Act, 1894, ss. 502–3).

At the port of discharge the duties of the owner and charterer are regulated by what is customary, and in the absence of custom by what is reasonable.

The merchants are under obligation to use all reasonable diligence to discharge the cargo under the circumstances which exist at the time, but are not liable for accidents or causes beyond their control; so, where a strike not due to fault on the part of the merchant delayed the discharge, the merchant was held not liable for the delay (*Hick*, 1893, A. C. 22). The charterer has to be ready without notice to receive the cargo (Carver, 457).

The exact place at which the carrying voyage begins and ends depends on the words used in the charter. If the ship is to go to a particular port, she has arrived when she reaches that port and is ready to load or discharge at a usual berth for loading or discharging. But if the charter indicates a particular part of the port, *e.g.* a named dock, the vessel has to

reach that part before she has arrived. This matter will require further consideration under the head DEMURRAGE.

The owner and his master are under obligation to take due care of the goods entrusted to them, and in case of emergency to act with reference to the interests of the venture as a whole. Thus the ship has been held liable in damages for carrying forward goods in a damaged state without taking steps which, in the circumstances, might reasonably have been done to condition them (*Notara*, L. R. 7 Q. B. 225; *Adams*, 18 R. 153). But the master is not under obligation to sacrifice the interests of the ship and venture generally, to lessen injury to particular goods. The question is one of reasonableness, all things considered. The master, if practicable, falls to consult the cargo-owner before incurring expense.

The charterer is liable in damages if injury results from his shipping dangerous or unlawful merchandise without the knowledge of the owner.

Freight.—In the general case the shipowner will only be entitled to the agreed-on freight provided that he carries out his contract and delivers the goods (*Metcalfe*, 2 Q. B. D. 423). Freight *pro rata itineris* can be demanded if, on the facts of the case, it is held there has been an agreement, express or implied, on the part of the merchant, to voluntarily take delivery of the goods at a port short of the destination, and to pay *pro rata* freight therefor (*The Soblomsten*, L. R. 1 A. & E. 297). If the merchant requires delivery of the goods at a port other than the port of destination, when the shipowner is willing to make delivery at that port, full freight will be due. In case the ship is damaged by excepted perils, the owner *may* tranship the goods and deliver them, and so earn the freight. If the ship is abandoned, no freight is due though the ship is brought in and the goods delivered (*The Kathleen*, 4 L. R. A. & E. 269; *The Arno*, 11 T. L. R. 453). Freight is due however damaged the goods may be, unless, indeed, they have lost their identity (*Dickson*, 13 S. L. R. 401; *Asfar* (1895), 2 Q. B. 196; affd. C. A. 12 T. L. R. 29).

By the terms of the charter the freight may be payable in any event, ship lost or not lost (*Leitch*, 7 M. 150). By the law of England, freight payable in advance is not recoverable back if the ship be lost on the chartered voyage (*Oriental S. S. Co.* (1893), 2 Q. B. 518). It is still unsettled whether the law of Scotland is the same; but if the charter provide that the merchant is to be allowed a deduction from the advance, to enable him to insure the advance, he cannot recover the amount if the ship has been lost by perils insured against (*Watson & Co.*, L. R. 2 Sc. App. 304). If, under the charter, a lump freight is payable for the cargo, it is not necessary, to recover the freight, that the whole cargo should arrive, provided part does (*Merchant Shipping Co.*, L. R. 9 Q. B. 99).

In certain cases where the cargo cannot be delivered at the port of discharge when the ship reaches there, the ship can claim compensation in the nature of further freight (known as back freight), in respect of carrying the goods to a port where they can be delivered (cargo *ex Argos*, L. R. 3 A. & E. 568; 4 A. & E. 13; 5 P. C. 134).

Reference must be made to special text-books for the various questions that arise on the terms of charters, as to the calculation of freight, and the construction of charters with regard to the payment thereof.

In the absence of indication in the contract or usage to the contrary, freight is payable on the quantity shipped in cases where the goods, owing to expansion or shrinkage, are larger or smaller at the port of discharge compared with the port of shipment (*Gibson*, 10 Ex. 622); but the matter is now generally determined by contract. Weighing, where necessary,

at the port of discharge has to be done by the ship, unless there is usage or bargain otherwise (*Coulthurst*, L. R. 1 C. P. 649).

If the master grants a number of bills of lading and inserts therein the freight payable in respect of the particular goods, the owner will, in a question with third parties, only have right to hold the goods for the freight payable therefor. So, if the charter freight is a rate freight, say per ton, the goods can only be held for the freight applicable to the parcel, unless the bill of lading clearly gives a lien for the whole freight (*Gardner*, 15 Q. B. D. 154). But in a Scotch case this was held to have been done by a reference to "other conditions as per charter party," though a rate freight was specified (*Lamb*, 9 R. 482). In the case of a lump freight, the shipowner may hold any one parcel for the whole chartered freight.

A claim for freight may be met by a counter claim for damage to cargo (*Taylor*, 9 S. 113).

Lien.—At common law the owner has a lien over the goods on board for the freight. He may by the terms of the charter waive the lien, *e.g.* by agreeing to take payment on terms inconsistent with retaining possession till the freight is paid (*Tamcaeo*, L. R. 1 C. P. 363). The implied lien for freight is for freight proper, and does not extend to cases of payment, *e.g.* of a sum, ship lost or not lost, because this is not freight proper, as it is payable whether the services are rendered or not.

Special provision is made by the Merchant Shipping Act, 1894, for the owner preserving possession while landing the goods (ss. 494 *et seq.*). There is also a lien for general average contributions due by cargo, or for special expenses incurred in preserving the cargo, but not impliedly for other claims by the shipowner, though it is common to contract for a lien for demurrage and in certain other cases.

Dead Freight.—This subject will be treated separately.

Special Provisions.—The reciprocal rights and obligations of the parties to the charter can of course only be indicated, but, as has already been said, any, or all of them, may be affected by express bargain. In certain cases the effect is to make proof of custom inadmissible, because contradictory of the written contract, *e.g.* when the charter bargains that goods are to be brought to and taken from alongside *at merchants' risk and expense*, a custom that the ship pays for lighterage is not admitted (*The Nifa*, *ut supra*; *Holman*, quoted in Carver, 2nd ed., 463).

Frequently provision is made for the ship proceeding to load or discharge at a safe port, or so near thereto as she can safely get. The port must not only be safe for the ship to lie at, but safe for her to leave as a loaded ship. It has been held that charterers who, having an option to name ports of loading, named a harbour with a bar, which required the ship to take a certain portion of her cargo outside the bar, were in breach of the contract (*Charpentier*, 15 L. S. R. 726). The words "so near thereto as she can safely get," do not merely refer to physical obstacles to the ship getting to the port, but to any cause which prevents her reaching the port in a reasonable time (*Dahl*, 6 App. Ca. 38). The fact that the ship cannot reach the port immediately will not, however, justify her in requiring the charterer to take delivery at the nearest place she can get to. She must wait a reasonable time, *e.g.* for spring tides, if by so doing she can reach the named port. The place so near thereto must, it has been said, be within reasonable reach of the named port—within what is known as the ambit of the port (*Schilizzi*, 4 El. & Bl. 873).

There have been conflicting decisions in Scotland and England on the question whether a ship, able to reach her port by discharge of part of her cargo,

is or is not bound so to discharge part, at all events if the merchant offers to pay the expense, and then to proceed to her named port (*Hillstrom*, 8 M. 463; *The Alhambra*, L. R. 6 P. D. 68; *Reynolds & Co.* (1896), 1 Q. B. 586; but see *Nielsen*, 16 Q. B. D. 67). The Scottish case, if it decided she is so bound, being the earlier in date, it is submitted should now be held overruled.

Demurrage.—Provision is made in most charters for the time to be occupied in loading and discharge; how the time is to be calculated; and the agreed-on sum to be paid if the ship is detained. This subject will be considered under the head DEMURRAGE.

Cancelling Clause.—By a clause known as the cancelling clause, it is often agreed that if the ship does not reach her loading port, or is not ready to load by a named date, the charterers have right to cancel the charter. The charterer is only bound to exercise his option when the ship arrives at the port, or is ready to load; and in the latter case the ship is not ready unless her whole holds are at the charterer's disposal, when he has chartered the whole ship (*Vaughan*, 2 T. L. R. 33; *Grampian S. S. Co.*, 9 T. L. R. 210; *The Austin Friars*, 10 T. L. R. 633).

Cesser Clause.—Another important clause on which there has been much litigation is that known as the cesser clause, whereby it is commonly provided that the charterer's whole responsibility is to cease on shipment of the cargo, the shipowner having a lien for freight, dead freight, and demurrage. The general rule is that such clauses relieve the charterer of claims in respect of matters after the ship has sailed on her voyage with the cargo and at the port of discharge, and of those claims prior to shipment of the cargo, and at the port of loading, for which the shipowner has, by the terms of the charter, any remedy given him, but leave the charterer liable to claims so far as the owner has no remedy whatever, unless he can claim against the charterer. Accordingly, where a ship was detained at her port of loading, not only for the agreed-on number of lay days in respect of which demurrage was payable, but for a further period, in respect of which there was a claim of damages for breach of the charter by detention of the ship, the charterer was relieved of the demurrage, as the owner had by the contract a lien, but had to meet the claim of damages in respect no lien was given therefor (*Gardiner & Co.*, 16 R. 658; *Clink* (1891), 1 Q. B. 625; *Dunlop & Sons* (1892), 1 Q. B. 507). The same principle has been applied as regards freight for which there was no lien (*Hansen*, 1894, 1 Q. B. 612).

It must, however, be observed that if the terms of the charter are absolutely clear, they will be enforced, however apparently unjust.

Negligence Clause and other Clauses of Exceptions.—The charter, as now framed, generally contains a clause which frequently runs as follows: "The act of God, the Queen's enemies, fire, perils of the sea, and all and every dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted." If this clause occurs in a bill of lading, it is for the benefit of the shipowner; but as the charter is a mutual contract, it is a question in each case whether the exceptions in it are mutual or not (cf. Scrutton, 3rd ed., 171; and Carver, 2nd ed., 157). The usual practice is to insert the word "mutually" when it is meant that the charterer shall take benefit of the exceptions (*Bruce*, 24 L. J. Ex. 321); and unless this is done, or the clause as framed indicates it is meant to be a mutual clause, it is submitted the exceptions should be treated as for the ship's benefit. After long controversy, it is now settled that "perils of the sea" and such other phrases, when used in relation to the contract of affreightment, have the same meaning as when used in policies of insur-

ance (*The Xantho*, 12 App. Ca. 503; *Hamilton*, 12 App. Ca. 518). The former of these cases settled that damage by collision at sea due to no fault on the part of the carrying ship, but to fault of the other ship, is a peril of the sea within the exception in the contract, overruling an earlier case. So far as necessary, these special exceptions will be examined elsewhere. But it must be kept in view that the liability of the insurer and of the shipowner depends on different considerations. Under a policy of insurance by which a ship is insured from loss by perils of the seas, the underwriters are liable to pay for a loss due to these perils, though brought about by the negligence of the assured's servants, for under the insurance contract the law regards only the *proxima causa*. In the same case, the shipowner may have excepted perils of the seas from his agreement to fulfil the contract of affreightment, but he is nevertheless liable in damages to the charterer, because, while the loss is one due to the perils excepted, he cannot found on the exception in the case of a person with whom he has contracted to carry goods, when the real explanation is that the casualty has been brought about, or materially contributed to, by the negligence of those for whom he is liable. So soon as this is ascertained, he is responsible. In such cases the *onus* of proof shifts from time to time. Once the shipowner has shown that the loss has been *primâ facie* due to perils of the sea, it is for the merchants to prove that there was negligence; but the facts themselves may easily raise a presumption of fault, which the shipowner must redargue (*Williams*, 11 R. 982; *Cunningham*, 16 R. 295).

The cardinal rules in construing exceptions in favour of shipowner or merchant, which purport to relieve them from the ordinary legal liability implied by the contract, are: (*a*) that it is for the party pleading the exception to bring himself within it, and prove that it applies; (*b*) that the clause is construed so as to restrict, no more than is necessary to give it a reasonable meaning, the legal liability, but (*c*) that its clear terms will be enforced. Sometimes in charters, and very commonly in bills of lading, there are long lists of exceptions which provide for almost every conceivable case, and it is impossible to do more than refer to some illustrative examples. As the exception of perils of the seas does not exclude liability for a loss from these perils due to negligence, so an exception of "leakage" or "breakage" is satisfied by holding that it relieves the owner from, in the first instance, accounting for the damaged state of the goods, and therefore does not relieve him, if the merchant affirmatively proves that the injury is due to the negligence of those in charge of the ship (*Moes, Moliere, & Tromp*, 5 M. 988; *Horsley, ut sup.*).

Accordingly, owners very generally further protect themselves by a negligence clause, which varies in different cases (see, *e.g.*, *The Accomac*, 15 P. D. 208; *The Cressington* (1891), P. 152; *The Southgate* (1893), P. 329; *Gilroy, ut supra*). It sometimes, though rarely, exempts the owner from responsibility for an unseaworthy ship, and not uncommonly does so, "provided all reasonable means have been taken to make the ship seaworthy." In this latter form it is, perhaps, not unreasonable, as it has been held a latent defect in the ship exposes the owner to claims in respect of his implied undertaking that the ship is seaworthy when she starts on her voyage (*The Glenfruin*, 10 P. D. 103). Under a contract freeing the shipowner from liability for unseaworthiness not due to want of reasonable diligence on the part of the owners, it has been held that the owner is not protected if there has been negligence on the part of his servants, *e.g.* the ship's carpenter (*Dobell*, 1895, *ut supra*). But the negligence clause does not relieve the shipowner of the condition to have the ship sea-

worthy unless clear words are used (*Steel & Craig & Gilroy, ut supra*; owners of cargo of *Maori King* (breakdown of refrigerating machinery), *ut supra*).

An ordinary form of negligence clause is one which provides that the negligence of the masters, mariners, and crew in the navigation of the ship is always excepted; but, as has been indicated, the clause often goes far beyond this, and, if unequivocal, it will be given effect to. Bad stowage by stevedores is not covered by the clause without words to that effect (*Hayn, ut sup.*). Indeed, it has been held that bad stowage is not part of the "navigation and management of the ship" within the meaning of these words as used in an exemptive clause in bills of lading or charter (*The Ferro* (1893), P. 38). But if the words of exception cover servants or agents of the owners in the navigation of the ship, *or otherwise*, this will exclude liability for bad stowage (*Baerselman*, 1895, 2 Q. B. D. 301).

A question has been raised whether the exceptions apply from the time the goods reach the shipowner's hands, or only after the voyage begins. If applicable to the earlier period, they will be so applied (*The Carron Park*, 15 P. D. 203; *Norman*, 25 Q. B. D. 475).

If the parties agree that goods are to be carried at owner's risk (that is, the goods owner's risk), this is held to mean that there is to be no claim in respect of negligence on the voyage (*Muir, Wood, & Co., ut supra*), and no further specification is necessary. But if the goods are jettisoned, the owner has a claim to average contribution from the ship, notwithstanding the clause (*Burton*, 12 Q. B. D. 218).

Of recent years, charterers and shippers have frequently insisted on exceptions in their favour, with the object of relieving them from claims in respect of failure to timeously furnish or take delivery of the cargo. The same rules are applied in the construction of these exceptions as is done in the case of exceptions in favour of the ship. Thus a clause providing that "detention by frost, floods, riots, and strikes of workmen . . . not to be reckoned lay days," was held not to exempt the charterer from delay in bringing the cargo into the particular dock where the ship was loading, as the clause could be read as applicable only to actual delay in loading, and the charterer's duty was to have the cargo forward (*Kay*, 10 Q. B. D. 241. See also *Grant*, 9 App. Ca. 470; *The Granite City S. S. Co.*, 19 R. 124; *Gardiner, etc.*, 20 R. 414). On the other hand, if the provision is clear, and the charterer brings himself within it, he will have effect given to it (*Letricheux*, 19 R. 209; *Lilly Co.*, 22 R. 278; *Smith & Service*, (1894), 1 Q. B. 174; *Crawford & Rowat*, Com. Ca. i. 277).

Dissolution of Charter.—In the case of a contract subject to so many risks as the contract of affreightment, occasion arises to consider how and in what cases it falls to be held dissolved without exposing either party to a claim for breach of contract. If, *e.g.*, the ship, owing to excepted perils, does not reach her port of loading until the whole object of the venture has been lost (*Jackson*, L. R. 10 C. P. 125), or if, after the date of the contract, the port of loading is blockaded with no prospect of cessation (*Geipel*, L. R. 7 Q. B. 404), in such cases either party can put an end to the charter without claim.

Once the cargo has been loaded, the Courts will be more slow to hold the contract dissolved, than where performance has not begun (see *Geipel, ut supra*); but in neither case will what is held to be a mere temporary hindrance or obstacle justify a party in throwing up the charter, or not executing it according to its terms (*Metcalfe, ut supra*; *Gifford & Co.*, 9 M. 1045). The question whether or not the cause is of so permanent a character as to justify dissolution or refusal to carry out the exact terms of the contract, is one to be determined having regard to the whole circumstances.

A shipowner is liable in damages if he abandons the chartered voyage because his ship has been damaged, unless either the ship is so damaged she cannot go on even after reasonable repairs, or the circumstances are such as to make it quite unreasonable, from a business point of view, to complete the charter (*Assicurazioni Generali Co.*, 1892, 2 Q. B. 652).

If circumstances unforeseen arise which make the exact performance of the contract impossible, the Court will in special cases imply an obligation to do what is reasonable. Where a ship was chartered with right to the charterer to order her either to Dunkirk or Dover, the charterer, a German, having ordered her to Dunkirk, thereafter the war between France and Germany broke out, it was held that the ship was entitled to deliver the goods at Dover (*The Teutonia*, L. R. 4 P. C. 171). But where a charterer had right to name any one of several places of discharge on the Thames, he was held entitled to name a place at which a strike was going on, and to take the benefit of an exemptive strike clause, though there was no strike at the other places (*Bulman* (1894), 1 Q. B. 179).

Questions also, of course, frequently arise whether a breach of charter entitles the other party to repudiate the contract, or only to claim damages. The general principles which regulate such questions are those applicable to mutual contracts. English cases must be applied with caution; and it must be remembered that in Scotland the ordinary rule is that breach of a material part of a mutual contract by one party entitles the other to refuse to perform his share. At the same time, once the charter has been in part implemented by shipping the cargo, it is difficult, and in most cases unjust, to rescind or put an end altogether to the contract; and then, in accordance with general principles, and subject to special cases, some of which have been already noted, damages are given for the breach, and the charter cannot be repudiated.

Damages.—The measure of damages in shipping contracts, and questions as to whether claims are too remote to be allowed, are also to be ascertained by reference to general principle.

The ordinary measure of damage in the case of refusal to load by the ship or merchant is the difference between chartered and current freight, plus any reasonable expense incurred. But this is subject to large variation, according to special circumstances.

It has been held that loss of special profit on a cargo cannot be claimed unless at the time of the charter the sale-contract was so communicated as to be in view of both parties (*The Parana*, 2 P. D. 118). Shipowner and freighter must both take reasonable steps to diminish the loss due to a breach of contract by the other. In the case of the shipowner failing to carry on goods timeously, the merchant may, so long as he acts reasonably, send them on at increased expense by another and quicker route so as to reach in time, and charge the ship therefor (*Fisher, Renwick, & Co.*, 10 R. 824). Where a ship was described in the charter "as now sailed or about to sail," failure to satisfy this condition was held sufficient to entitle the charterer to repudiate the contract, though in the particular case he was held to have waived his right and could only claim damages (*Bentsen* (No. 2), (1893), 2 Q. B. 274). As we have seen, a charterer who agrees to load a full cargo on board a ship has not the right to ship cargo on deck in the absence of custom or bargain; and while the shipowner may be liable in damages, if any, if he carries goods on deck under such a charter, the charterer cannot claim the freight earned (*Wills & Co., ut supra*). A charter contained an exception of fire which applied to the charterer. A large portion of the intended cargo was burned. The charterer was held

bound to supply the balance of the cargo, and the shipowner entitled to fill up the ship with cargo so long as he did not unreasonably delay her sailing, and to keep the freight for himself (*Aitken, Lilburn, & Co.* (1894), 1 Q. B. 773). These examples may to some extent indicate the lines on which general principles have been applied to the contract under consideration.

See AVERAGE; BILL OF LADING; DEAD FREIGHT; DEMURRAGE; MUTUAL CONTRACT; DAMNUM FATALE; NAUTÆ, CAUPONES, etc.; PERILS OF THE SEAS; etc.

Scrutton on *Charter Parties and Bills of Lading*; Carver on *Carriage of Goods by Sea*; Abbott on *Shipping* (13th ed.); Black, *Scottish Shipping Cases*.

Chartered Accountant.—Chartered accountant is the professional designation used by accountants who are members of one or other of the three societies of accountants in Scotland, which are incorporated by Royal Charter. These three societies are:—"The Society of Accountants in Edinburgh," which received its charter in 1854; "The Institute of Accountants and Actuaries in Glasgow," which received its charter in 1855; and "The Society of Accountants in Aberdeen," which received its charter in 1867. The members of these three societies also use, for professional purposes, the initial letters "C.A." to represent the words "chartered accountant." While in the present state of the law it is open to any one who pleases to practise in Scotland as an accountant, no one who is not a member of a chartered society is entitled to call himself a "chartered accountant," or to use the letters "C.A." as a professional designation (*Society of Accountants in Edinburgh*, 1893, 20 R. 570).

The ordinary method of admission to any one of these societies is by examination following upon apprenticeship to a chartered accountant. The three societies have a joint examining board. An apprentice, who must be at least seventeen years of age at the commencement of his apprenticeship, is required to pass a preliminary examination in general knowledge, prior to or within six months after the date of his indenture. A graduate of any University of the United Kingdom, however, or a person who has obtained the Government school leaving-certificate, or who has passed an examination which, in the opinion of the general examining board, is equivalent to the preliminary examination, is exempt from that examination. After one year of the apprenticeship has been served, and at least one year before he presents himself for the final examination, the apprentice is required to pass an "intermediate examination" in mathematics and professional knowledge, including book-keeping. The final examination takes place after the term of apprenticeship has expired. Before presenting himself for it, the candidate must have attended a class of Scots Law at a Scottish University, and such other classes as may be prescribed by the rules of the particular society which he wishes to join. The subjects of the final examination are the law of Scotland, the elements of actuarial science and of political economy, and the general business of an accountant. The period of apprenticeship which must be served is, in the cases of the Edinburgh society and the Aberdeen society, five years, and in the case of the Glasgow institute, four years. The Edinburgh society exacts an apprenticeship fee of one hundred guineas, and an admission fee of one hundred guineas. The Glasgow institute has no apprenticeship fee, and the admission fee is fifty guineas. The Aberdeen society has an apprenticeship fee of twenty-five guineas, and an admission fee of forty guineas. The Glasgow institute admits as associates persons who are training to become members. These associates must pass an examination and pay certain fees, upon which

they are entitled to some of the privileges of the institute, but have no voice in the management or interest in the funds of the institute. The Council of the Glasgow Institute has also power to admit as members of the Institute, in certain circumstances and upon certain conditions, accountants of good standing and of at least ten years' practice, without requiring them to serve an apprenticeship. Each society possesses a hall and library for the use of its members. The Edinburgh society also has invested a large sum of money in connection with a fund to provide annuities, etc., to the members, and to their widows and representatives, under "The Edinburgh Chartered Accountants' Annuity, etc., Fund Act, 1887" (50 Vict. c. 11). This fund at present amounts to over £20,000. At the present time (1896), there are 310 members in the Edinburgh society, 244 members and 192 associates in the Glasgow institute, and 32 members in the Aberdeen society.

The "Institute of Chartered Accountants in England and Wales" obtained its charter in 1880. Its members are divided into "Fellows" and "Associates," the former being entitled under the charter to use, as a professional designation, the letters "F.C.A.," and the latter the letters A.C.A."

The business of an accountant is of a varied nature. The auditorships of the vast majority of public bodies and public companies, as well as of many private businesses, are held by accountants. By a bill at present before Parliament, it is proposed to make it obligatory upon every company, registered under the Companies Act, to have an annual audit of their accounts, as it is at present obligatory upon banking companies constituted since the passing of the Companies Act of 1879. There have been several recent decisions in England as to the duties of an auditor, and as to his responsibility. It has been held that his duty is not confined to verifying the arithmetical accuracy of the balance-sheet, but that he is bound to inquire into its substantial accuracy, and that he is not entitled to rely upon the manager's certificate, as to the value of the stock-in-trade, if an ordinary careful examination of the books should have made him suspect the truth of it (*Leeds Estate Building Co.*, 1887, 36 Ch. D. 787; *Kingston Cotton Mill Co.* [1896], 1 Ch. D. 331). Failure to use reasonable skill and diligence will render an auditor liable in damages (*Leeds Estate Building Co., ut supra*), if the direct result of the failure is pecuniary loss (*Kingston Cotton Mill Co., ut supra*), but a mere error of judgment will not make him liable (see *Purves*, 1845, 4 Bell's App. 46). It has been held in England that an auditor is an officer of the company in the sense of s. 10 of the Companies (Winding-up) Act of 1890 (53 & 54 Vict. c. 63), which is practically a re-enactment of s. 165 of the Companies Act of 1862, and that if he is guilty of misfeasance, or breach of duty, he may be made liable in proceedings under that section (*London and General Bank* [1895], 2 Ch. 166, 673; *Kingston Cotton Mill Co.* [1896], 1 Ch. D. 6). (See JOINT STOCK COMPANY.) An accountant is also the person usually selected to act as trustee upon a bankrupt estate, and the appointment of judicial factor or *curator bonis* is very frequently conferred by the Court upon an accountant. Where an action of count and reckoning, or of ranking and sale, or any other action involving an accounting between the parties, is before the Court, a remit is usually made to an accountant to prepare a state of accounts or a scheme of ranking and division. Where such a remit is necessary, the assistance of the accountant may be obtained by the Court in settling the terms of the remit, or, after his report has been lodged, in preparing the draft of the judgment of the Court (Court of Session Act, 1868, 31 & 32 Vict. c. 100, ss. 81, 87). An accountant to whom a remit has been made has power to compel the production of documents, and

the attendance of parties and witnesses, and, in default of such production or attendance, he may proceed *ex parte* (ss. 82, 83). He has also power to apply to the Court for directions on any point of difficulty which may arise under the remit (s. 84); and there is a provision enabling either party to bring under review of the Court any interim order or proceeding of the accountant, or to ask the Court to give him special directions on any point arising under the remit (s. 85). When the accountant has completed his inquiry, he reports to the Court, in the form of a certificate, the facts which he has found to be established, and the results at which he has arrived, and adds any necessary explanations in the form of a note (s. 86). (See REMIT.) Many accountants also hold the position of factor or commissioner upon landed estates, and as such look after the whole management of them for the proprietors.

While an accountant has not the lien of a law agent over documents put into his hands for professional purposes, it has been held that he has a right, under the contract made with his employer, to retain such documents until his account for the work done in connection with them has been paid (*Meikle*, 1880, 8 R. 69; *Stewart*, 1828, 6 S. 591; *Bruce*, 1835, 13 S. 437).

There is at present in the House of Commons a bill by which it is proposed to regulate the profession of accountant on lines similar to those on which the professions of law agents and solicitors and medical practitioners have been organised. It is proposed to constitute a governing body, and to confer statutory powers for keeping a register of qualified practitioners, and to enact that only persons so registered shall be entitled to hold themselves out to the public as practising professional accountants. The bill would also prohibit the use in Scotland of the term "chartered" by any accountants in Scotland other than the members of the three existing chartered societies. (This bill has now been withdrawn, as pressure of public business rendered its passing this session impossible.)

Chaude Melle.—The ancient Scottish Statutes distinguished between homicide, which was premeditated, or *forethought felony*, and that which took place on a sudden or in *chaude melle* (hot broil). This distinction is first noted in an old Act of 1371, and it is preserved in 1425, c. 51; 1426 c. 89, 95; 1469, c. 35; 1491, c. 28; 1535, c. 23, and 1555, c. 31. Under these Statutes, while no indulgence was granted in the case of premeditated murder, the privilege of girth and sanctuary was allowed where the homicide took place in *chaude melle*. It was competent, under our ancient practice, to withdraw a refugee from the sanctuary in order that he might be tried; but if he then proved his allegation of *chaude melle*, he had to be returned to the sanctuary, safe in life and limb. It has been said that the distinction between forethought slaughter and homicide in *chaude melle* was abolished by the Act 1661, c. 22, and that the distinction is no longer recognised in practice. Hume, however, shows conclusively that the latter form of homicide is really dealt with in the Statute of 1661 as casual homicide, and, as such, is punishable by an arbitrary penalty. (See CASUAL HOMICIDE.) There can, moreover, be no doubt that the distinction between these two forms of homicide still exists in practice, though the names have become obsolete. Homicide in *rixa* or *chaude melle* is never punished as murder. It is culpable homicide, and is punishable by an arbitrary sentence.—[Hume, i. 240; Ersk. iv. 4. 40.]

In the law of England, the phrase *chance medley*, or *chaud medley*, signifies a sudden encounter or affray, and, by the law of homicide of that country, a

man is *excused* or, it may be, *justified* if, in a sudden affray, he defends himself by killing his assailant.—[Steph. *Com.*, 12th ed., IV. 42.] See AFFRAY.

Cheques.—*Cheque on a Banker.*—The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), Part iii. (ss. 73 to 82), deals with and codifies the law relating to cheques on a banker. In the following article the sections referred to are those of the Bills of Exchange Act, and where not given in detail will be found in a preceding article on Bills of Exchange.

Definition of a Cheque.—(s. 73) A cheque, which includes coupons on Colonial Stock certificates (40 & 41 Vict. c. 59, s. 7), is a bill of exchange drawn on a banker (s. 2), payable on demand (s. 10). Except as otherwise provided in this part, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque (*Maclean*, 1883, 11 R. (H. L.) 1). A cheque does not require to be accepted, and there are no days of grace allowed.

Form of a Cheque.—The usual form of a cheque is—

[*Date.*]

To the Bank.

Pay to or order [*or* bearer]

the sum of

. . . . . .

There is, however, no statutory form, and so long as the essentials of a cheque are observed, any words may be used.

Essentials of a Cheque.—(*a*) It must be in writing, but need not be dated (s. 3). (*b*) It must contain an unconditional order to pay, and must be so expressed as to imply a demand made by a person who has a right to make it, on another who has a duty to obey. The demand may be expressed in terms of courtesy, but a mere hope that the addressee will pay is not sufficient (*Little*, 1 M. & W. 171; see also *Hamilton*, 1849, 4 Exch. 200). The order must be unconditional, and it must be expressed so as to imply payment. Thus "debit my account" has been held equivalent to an order to pay (*Swan*, 1841, 4 D. 210), and expressions such as "deliver," "credit in cash," etc., are effectual (Chitty on *Bills*, p. 110). (*c*) It must be drawn on a banker. (*d*) It must be signed by the drawer. The signature must be that of the person in whose name the account is kept, or of some one authorised by him to sign that name (s. 91 (1)), or the signature of a person who has authority, as agreed between the banker and his customer, to operate on the account. (*e*) It must be payable on demand. (*f*) It must be an order to pay a sum of money; and (*g*) it must be made payable to a specified person, or to order, or to bearer.

Stamp Duty.—Cheques are liable to a uniform duty of one penny, irrespective of their amount, and the duty may be paid by means of an adhesive stamp. See BILLS OF EXCHANGE; STAMP DUTY.

Holder in Due Course.—(s. 29) Every holder of a cheque is *primâ facie* deemed to be a holder in due course. But if, in an action on a cheque, it is admitted or proved that the issue or subsequent negotiation of the cheque is affected with fraud, duress, force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the cheque (s. 30; *see* also *Tyler*, 1892, 30 S. L. R. 583).

Antedating and Post-Dating of Cheques.—See s. 13 (2).

Negotiation of Post-Dated Cheque.—A post-dated cheque may be negotiated, and that before the date it bears (*Royal Bank*, 1894, 2 Q. B. 715).

Endorsation.—The endorsation of a cheque, which is usually but not necessarily written on the back, operates as a receipt or discharge to the banker who honours the cheque. A cheque drawn in favour of "*A. B.* or bearer" is negotiable by delivery without endorsation, and when presented for payment requires no endorsation. As between himself and his customer, a banker who pays such a cheque without the endorsation of the person presenting it is protected by the rule of law, that where a document of debt is in the possession of the debtor, payment is presumed. A cheque drawn payable to bearer, so long as it purports to be so payable, cannot be restrictively endorsed by the payee or any subsequent holder so as to be payable to the order of the endorsee, although the payee of such a cheque is entitled to substitute the word "order" for the word "bearer" in the body of the cheque, and thus to change the cheque from one payable to bearer to one payable to order. A cheque in favour of a person "or order" is negotiable by the endorsation of that person, or by some one having his authority. The endorsation may be (*a*) general; (*b*) special; or (*c*) restrictive (s. 32).

A banker is bound to pay a cheque which purports to be endorsed by the person to whom it is drawn payable, and so long as the endorsement is regular, the banker is under no obligation to ascertain that it is *bonâ fide*. In the case of a crossed cheque, his freedom from liability depends on his obeying the direction conveyed by the crossing (*Smith*, 1875, 1 Q. B. D. 31).

Forged Signature of Drawer.—See BANKER (*Payment on Forged Signature*).

Forged Endorsation.—Sec. 19 of the Stamp Act of 1853 (17 & 18 Vict. c. 59), which is not repealed by the Bills of Exchange Act, provides that "any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall, when presented for payment, purport to be endorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such endorsement, or any subsequent endorsement, was made by or under the direction or authority of the person to whom said draft or order was or is made payable, either by the drawer or any endorser thereof." Sec. 60 of the Bills of Exchange Act substantially repeats this provision. The protection afforded by the Statute applies only to uncrossed cheques, and to the banker on whom the cheque is drawn. It does not extend to an endorsee, who takes the cheque with all the latent rights and disabilities of the person from whom he received it, or to a banker who undertakes to collect the proceeds on behalf of a person who is not a customer of his own. Where a cheque is presented to a banker other than him on whom it is drawn, by a stranger, it is the duty of such banker to satisfy himself that the person who presents the cheque is the person in right of it. Thus in one case a cheque was drawn by *A. B.*, payable to *C. D.* or his order. It was stolen from *C. D.* by his clerk, who, after forging his master's signature, presented it to a banker to whom he was a stranger, for the purpose of collection. The collecting banker received the proceeds from the drawee, and handed them, less commission, to the thief, who absconded. In an action by the drawer, it was held that, while the banker on whom the cheque was drawn was protected, on the ground that, though he was bound to know the signature of his customer, the drawer, he could not be supposed to know that of the payee, and that he had paid the cheque to the order of the person to whom it purported to be payable, no such protection was afforded to the collecting bank, who took the cheque with all the disabilities attaching to the person from whom he received it, and who must be held to have received payment from the

drawee, not on behalf of his principal, but of the true owner, the person who had a legal title to it prior to the forgery (*Ogden*, L. R. 9 C. P. 513. But see *Crossed Cheques*).

A forged or unauthorised endorsement upon a cheque payable to order operates not only to annul all rights or obligations of the endorsers or endorsees subsequent to such endorsation, but also to extinguish the debt due to any such endorsee by the endorser from whom he received the cheque (ss. 24, 73). Each *bonâ fide* holder may, however, recover from his predecessor in title until the author of the forged or unauthorised signature is reached (*Macdonald*, 1864, 2 M. 963).

Crossed Cheques.—The crossing of cheques is of comparatively modern introduction, it being first used towards the end of last century. The practice originated at the London Clearing House; the clerks of the different bankers who had business there having been accustomed to write across the cheque the names of their employers, so as to enable the Clearing House clerks to make up the accounts. It afterwards became a common practice to cross cheques which were not intended to go through the Clearing House at all with the name of a banker or with the words "& Company," the object being to secure that payment was made to a banker, in order that it might be easily traced for whose use the money was received, and to compel the holder to present the cheque through a quarter of known respectability and credit. The crossing of a cheque operates as a direction to the banker upon whom the cheque is drawn to pay the cheque in a particular way, and in that way only. Cheques may be crossed either generally or specially.

General Crossing.—(76 (1)) Where a cheque bears across its face an addition of (*a*) the words "and Company," or any abbreviation thereof, between two parallel transverse lines, either with or without the words "not negotiable," or (*b*) two parallel transverse lines simply, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed generally. By crossing a cheque generally a direction is given to the banker on whom it is drawn not to pay the cheque otherwise than to a banker; and to the holder, an intimation that he can receive payment only through a banker.

Special Crossing.—(76 (2)) Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker. The name of a banker written across the face of the cheque, without the addition of the two parallel transverse lines, is sufficient to constitute a special crossing. A cheque which is crossed generally, with the addition of the name of a town, is not thereby crossed specially, as the name of a town is not recognised either by law or custom as part of a crossing.

Effect of Special Crossing.—By crossing a cheque specially, a direction is given to the banker on whom it is drawn to pay it only to the banker with whose name it is specially crossed, or to his agent for collection, being a banker. In a case decided in 1890 (*National Bank*, L. R. 1 Q. B. 435), a cheque was drawn to the order of a person, and crossed to a bank where he kept an account. On receiving the cheque, the bank placed it to the payee's credit, and he drew upon it. The cheque was subsequently presented, and payment was refused; and it was held that the crossing did not restrict the negotiability of the cheque to the bank, and that the bank were entitled, as holders in due course, to sue the drawer.

Crossing obliterated.—Where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a

crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by the Act (s. 77), the banker paying the cheque in good faith (s. 90) and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated, or having been added to or altered otherwise than as authorised by the Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection, being a banker, as the case may be (s. 79).

Crossing by Drawer, or after Issue.—(s. 77) (1) A cheque may be crossed generally or specially by the drawer. (2) Where a cheque is uncrossed, the holder may cross it generally or specially. (3) Where a cheque is crossed generally, the holder may cross it specially. (4) Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." (5) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection. (6) Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

Crossing a Material Part of a Cheque.—(s. 78) A crossing authorised by the Act is a material part (s. 64) of the cheque: and it is not lawful for any person to obliterate or, except as authorised by the Act, to add to or alter the crossing (s. 77).

Duties of Bankers as to Crossed Cheques.—(s. 79 (1)) Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment. The remedy of the holder in such a case is to get a new cheque from the drawer, and failing this, then to sue him for the amount.

Liability of Banker paying a Crossed Cheque.—(s. 79 (2)) Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed, or his agent for collection, being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid (*Smith*, L. R. 1 Q. B. D. 31). The drawer of the cheque, however, has no right of action against the banker who honours a crossed cheque contrary to the directions given by the crossing, simply on that ground. He must prove that he has suffered loss thereby. The drawer of a cheque which has been paid contrary to his direction has a right to sue the person who has received payment of it, if such person had a bad title thereto (*Bobbett*, L. R. 1 Ex. D. 363).

Protection to Banker and Drawer where Cheque is Crossed.—(s. 80) Where the banker on whom a crossed cheque is drawn, in good faith and without negligence, pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof. The drawer of the cheque in such circumstances will be discharged of his liability to the payee for payment of the debt for which the cheque is given, provided the cheque has reached the hands of the payee, and has been lost by or stolen from him. The remedy of the payee in such circumstances is against the person on whose behalf the amount of the cheque has been collected.

Position of Holder of Crossed Cheque "not Negotiable."—(s. 81) Where a

person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. No one, therefore, can be a holder in due course of such a cheque. A person who even *bonâ fide* and in ignorance of his transferror's want of title takes such a cheque from a finder or a thief, is in the same position as one who takes a cheque payable to order the endorsement on which has been forged (see *supra*, *Forged Endorsations*). The object of the addition is to give protection to the true owner of the cheque by preserving his right against any subsequent holder, and the addition of the words "not negotiable" imposes on the banker no liability other than that attaching to crossed cheques generally.

Protection to collecting Banker.—(s. 82) Where a banker, in good faith and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker incurs no liability to the true owner of the cheque by reason only of having received such payment. The banker who is to obtain payment of a cheque is not in right of it; rather he acts for his own customer, and as his hand and agent, and it is immaterial whether the collecting banker has paid to his customer in anticipation of the cheque being paid on presentation, or has handed the proceeds to him after collection (*Clydesdale Bank*, 1876, 3 R. 586). To entitle the banker to this defence, he must actually have paid the amount to his customer, and not merely given him credit for it in his books. For as money paid to the credit of a customer in a banker's books is the property not of the customer but of the banker (see BANK: BANKER), the true owner of the cheque may sue the banker, on the ground that he has received the money and applied it to his own use (*Arnold*, L. R. 1 C. P. D. 578; *Ogden*, L. R. 9 C. P. 513). A banker, however, who collects on behalf of a stranger, has no such immunity, as in such a case he is bound to make full inquiries as to the title of the person for whom he acts (*Matthews*, 1894, 10 T. L. R. 386).

Presentment for Payment.—How made.—A cheque must be presented to the banker, within bank hours on a business day and at his place of business, by the holder or some person authorised by him to receive payment on his behalf (s. 45 (3). A cheque payable at a branch bank must be presented there, and not at the head office.

Presentation may be made through the post office (s. 45 (8)).

Time for.—A cheque must be presented within a reasonable time of its issue (s. 2). In determining what is a reasonable time, regard is had to the nature of the cheque, the usage of trade and of bankers, and the facts of the particular case (s. 74 (2)).

Somewhat different considerations arise in respect to what will be considered reasonable time, according to the relations of the parties between whom the question is raised.

As between Drawer and Payee.—A cheque is not satisfaction of the payment of a debt until it is honoured; and unless damage have resulted from the delay, the payee of a cheque may present it at any time within six years). If no damage have resulted from the delay, and the cheque is dishonoured, the drawer is still liable. If the cheque be not presented within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the banker, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage; that is, to the extent to which such drawer or person is a creditor of the

banker to a larger amount than he would have been had such cheque been paid. So, when a cheque is not presented within such reasonable time, and the banker on whom it is drawn fails in the interval, the drawer suffers no loss if in the interval he has withdrawn all his funds, and he is therefore liable to the payee in the full amount. But if in the meantime the fund on which the cheque is drawn is altered for the worse, the drawer is, according to circumstances, either wholly or partially discharged of his liability to the payee. Thus, if in the interval the banker has failed while holding funds sufficient to meet the cheque, the drawer suffers loss to the full extent of the amount of the cheque, and his liability to the holder is completely discharged. So also if in the interval the banker has ceased to allow his customer to overdraw (*Hopkins*, L. R. 2 Ex. 268). But if in the interval the banker has failed, and at the date of his failure had funds of the drawer's in his possession, but insufficient in amount to meet the cheque, the loss which the drawer suffers is the amount which remained in the banker's hands; and his liability to the holder, whose presentation of the cheque operates as an intimated assignation in his favour, is limited to the difference between the amount in the banker's hands and that of the cheque. The holder of such a cheque as to which the drawer has been discharged wholly or partially of his liability, is a creditor of the banker to the extent of the discharge, and is entitled to sue the banker for the amount of his debt to the extent of the funds in his possession (s. 74 (3)).

As between Drawer and Transferee.—The transferee of a cheque is, as regards his right to recover from the drawer in the event of the cheque being dishonoured, in the same position as the payee, and he is therefore bound to present the cheque within the time available to the payee.

As between Payee and Transferee.—When a cheque is transferred by endorsation, the transferee has a right of action against both the drawer and the endorser, the endorser standing in the same relation to his endorser as the drawer does to the payee. To render an endorser liable, presentation of the cheque must be made by the endorsee within a reasonable time (s. 45 (2)).

As between a Banker and his Customer.—When a banker is entrusted with a cheque for presentation and collection by the payee or holder, he has, as between himself and his customer, the day after receipt of the cheque to present it, unless circumstances exist from which a contract or duty on the part of the banker to present earlier, or to defer presentment to a later period, can be inferred. If the banker employ an agent to present the cheque on his behalf, he will have, the day after receipt, to post it to such agent, and the agent similarly will have, the day after the cheque reaches him, to present it to the drawee.

Stale or Overdue Cheques.—A cheque is deemed to be stale or overdue when it appears on the face of it to have been in circulation for an unreasonable length of time (s. 36 (3)). "It cannot be laid down," said L. Tenterden in *Rothschild*, 9 B. & C. 388, "that, as a matter of law, a party taking a cheque after any fixed time from date does so at his peril, and that the mere fact of the banker having cashed the cheque five days after it bore date, for a person who had not given value for it, did not entitle the drawer to recover from the banker." By unreasonable time is meant such a length of time as ought to have excited suspicion in the mind of an ordinarily careful holder (*Landon and County Bank*, L. R. 8 Q. B. D. 288–95). As to negotiation of overdue cheque, see s. 36 (2).

Revocation of Banker's Authority to pay Cheques.—See BANKER (*Countermand of Cheque*).

Alterations on Cheque.—See BANKER (*Payment of Altered Cheques*).

Lost Cheques.—See BILLS, and ss. 46 (1), 50 (2), 51 (8), 69.

Paid Cheques.—When a cheque is paid, the holder is bound forthwith to deliver it up to the banker paying it (s. 52 (4)), in whose hands it is *primâ facie* evidence of the payment of the amount. A cheque, on payment, becomes the property of the drawer, but the banker who pays it is entitled to keep the document as a voucher until his account with his customer is settled, or until the customer's account is docqueted.

A paid cheque in the drawer's possession is *primâ facie* evidence of payment as between him and the payee. It is not obligatory for the banker who pays a cheque to cancel the drawer's signature.

Valuable Consideration.—A cheque is valid in Scotland though given for no valuable consideration. The plea of non-onerosity is, however, relevant, (1) where there is no intention to grant an obligation, or where a cheque has been obtained from the drawer by fraud or force and fear. If the cheque has been passed on to a third party, such third party, to entitle him to recover from the drawer, must prove that he obtained it for valuable consideration; (2) where a cheque has been drawn on condition that it shall only be used on the occurrence of a certain event which does not happen, or in payment of goods which are not delivered (*Fortune*, 1831, 10 S. 115; *Agra Bank*, L. R. 2 Ex. 56); (3) where it is given in consideration of the payee's delaying enforcement of an obligation which afterwards turns out to be invalid (*Macdonald*, 1864, 2 M. 963); (4) where it is given for an immoral consideration, or one contrary to Statute; (5) where it is reducible either at common law or by Statute at the instance of the drawer's creditors.

Protest of Cheque.—Where it is necessary to protest a cheque to preserve recourse, or otherwise, the following is the form used:—

[COPY CHEQUE.]

At Glasgow, the day of , in the year , the principal cheque or order above copied was, at the desire and request of , the endorsees and holders thereof, duly and lawfully presented by me, , Notary Public, to the agent of the Bank at , requesting him to pay the same, or to give a fiat to the teller of said Bank for payment thereof; which he refused to do, saying that the Bank had no funds to meet the said cheque or order: Therefore I, the said Notary Public, protested, as I do hereby protest, the said cheque or order, not only against the above-named [*here add designation*], the granter thereof, for non-payment of the said cheque or order, but also against the above-named payee and endorsers thereof for recourse, and against all concerned for all exchange, re-exchange, interest, costs, damages, and expenses, as accords of law, before and in presence of *A. B.* and *C. D.*, witnesses to the premises, specially called and required.

Summary Diligence.—It has never been decided that summary diligence upon a cheque is competent in Scotland, and the almost universal opinion among authorities before the passing of the Act was that summary diligence was incompetent. While the Act defines a cheque as a bill of exchange payable on demand, it also enacts (s. 98) that nothing contained in it shall extend, or restrict, or in any way alter or affect the law and practice in Scotland in regard to summary diligence. It therefore appears that summary diligence is still incompetent. In the discussion in *M'Lean* (1883, 11 R. (H. L.) 1) this seems to have been taken as fixed law (see L. Blackburn's opinion at p. 5). See BANK; BANKER (*Banker's Duty towards Customers' Cheques*).

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